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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THOMAS SPIEGEL,
Petitioner,

VS.

TIMOTHY RYAN AND UNITED STATES DEPARTMENT OF TREASURY, OFFICE OF THRIFT SUPERVISION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a temporary cease and desist order issued pursuant to 12 U.S.C. §1818(c)(1) by the Department of the Treasury, Office of Thrift Supervision, immediately freezing petitioner's financial accounts and directing restitution of $21 million under threat of daily accruing monetary penalties, without prior notice or hearing and without an independent determination of probable validity violate due process of law?

2. Does the Due Process Clause permit seizure of assets held by former thrift executives, as part of a civil restitution demand, without the minimal procedural safeguards that courts have previously determined must be provided to a suspected racketeer or drug kingpin before an equivalent asset forfeiture?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Thomas Spiegel respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on October 11, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 946 F.2d 1435, and is reprinted in the appendix hereto, pp. A-6 to A-23, *infra.* The Order Re Injunction and the Amended Order Re Preliminary Injunction of the United States District Court for the Central District of California (Wilson, D.J.) have not

been reported. They are printed in the appendix hereto, pp. A-24 to A-42 and pp. A-43 to A-62, *infra*.

JURISDICTION

The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1). The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on October 11, 1991. No petition for rehearing was sought.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATUTES INVOLVED

12 U.S.C. § 1818(b) authorizes an "appropriate Federal banking agency," including the Office of Thrift Supervision ("OTS"), to initiate administrative proceedings to remedy allegedly illegal or unsafe or unsound business practices at a banking or thrift institution. Subsections 1818(b)(1) and (b)(6) as they read at the time the Temporary Order issued are set forth in the appendix hereto, p. A-1, *infra*. Subsection (b)(6) was amended by section 2596(a) of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Title XXV of the Omnibus Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, 4908, following the district court's decision. The amended language is set forth at p. A-2, *infra*.

12 U.S.C. § 1818(c)(1) provides in part that, during the pendency of permanent cease and desist proceedings,

OTS and other regulatory agencies may issue a temporary order requiring a depository institution or an institution-affiliated party such as petitioner to cease and desist from alleged violations and to take action to prevent on-going harm. Section 1818(c)(1) as it read at the time of the district court's decision is set out in full at p. A-3, *infra*, and as amended following the district court's decision by § 2596(b) of the Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, 4908, at p. A-4, *infra*.

STATEMENT OF THE CASE

Petitioner is the former chief executive officer and chairman of Columbia Savings And Loan Association ("Columbia"), a publicly held corporation licensed by the State of California to transact a savings and loan business.[1] This case involves the use by federal thrift regulators of their power to issue Temporary Orders To Cease And Desist to effect an immediate freeze of petitioner's assets without notice or a hearing, and without any independent evaluation of the probable validity of their allegations of misconduct, as part of administrative proceedings seeking civil restitution.

The OTS Examination

On November 28, 1989 the Office of Thrift Supervision commenced an investigation of Columbia's financial affairs to determine whether there had been any violations of the statutes or regulations governing depository institutions and whether petitioner or other Columbia officers

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[1]On January 25, 1991 the Resolution Trust Corporation ("RTC") became conservator for Columbia. On March 22, 1991 the assets of Columbia were transferred to a new federally chartered institution, Columbia Savings And Loan Association, F.A., of which the RTC is the conservator.

had engaged in unsafe or unsound banking practices. Petitioner appeared before OTS pursuant to an investigative subpoena, and his counsel met with a senior enforcement attorney for OTS to discuss the status of the investigation.

OTS' Notice of Charges and Temporary Order

On July 5, 1990 respondent Timothy Ryan, the Director of OTS, authorized issuance of a Notice of Charges And Hearing and Notice of Intention To Remove and Prohibit, and to Demand Restitution, and Notice of Assessment of Money Penalty against petitioner pursuant to 12 U.S.C. § 1818(b)(1). The Notice stated the conclusion that petitioner had engaged in unsafe and unsound practices, and alleged that he had misused corporate assets, authorized improperly underwritten loans and committed other banking law violations. An administrative hearing was scheduled for September 4, 1990, to determine whether a permanent cease and desist order should be issued against petitioner.[2]

Concurrently with issuance of the Notice of Charges, Ryan approved issuance of a Temporary Order To Cease And Desist pursuant to 12 U.S.C. § 1818(c)(1), which immediately froze all of petitioner's financial accounts,[3] ordered that he place all of his Columbia stock into an

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[2]An Amended Notice of Charges was filed on September 4, 1990. The administrative hearing, originally scheduled to begin on September 4, 1990, has not yet taken place. It is currently set for March 31, 1992.

[3]The Temporary Order prohibits petitioner from "directly or indirectly withdrawing or transferring or attempting to withdraw or transfer funds or other assets from any account at any financial institution or brokerage firm, including without limitation Columbia . . . ." See p. A-64, *infra*.

escrow account, and required him to make immediate restitution or post more than $21,000,000 in security by noon the following day, July 6, 1990. That sum purportedly "represents the amount of unjust enrichment, including interest," enjoyed by petitioner as a result of the various unsafe and unsound practices alleged in the Notice of Charges. See, *e.g.*, p. A-65, *infra*.[4] The Temporary Order was "effective immediately" upon receipt by petitioner. See p. A-64, *infra*. *See also* p. A-71, *infra* ("THIS ORDER shall be and is effective upon service").

Petitioner's Complaint and TRO Application

On July 6, 1990, the morning following issuance of the Temporary Order and several hours before OTS' deadline, petitioner commenced this action in the Central District of California to enjoin enforcement of the Temporary Order pursuant to 12 U.S.C. § 1818(c)(2).[5] He simultaneously sought issuance of a Temporary Restraining Order and Order to Show Cause re Preliminary Injunction on the ground that the Temporary Order exceeded OTS' statutory authority. After consideration of evidence presented in connection with the TRO application and oral argument, the district court granted the

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[4]Although both the Notice of Charges and Temporary Order demand "restitution" based upon petitioner's "unjust enrichment," the majority of OTS' charges seek money damages, not recovery of sums paid to petitioner. For example, OTS demands nearly $6 million "restitution" for losses on loan provided to Gregg Motors, an entity in which neither petitioner nor any of his family had a direct or indirect interest, and another $6.5 million expended for investment by Columbia in a corporate airplane and hanger, tangible assets held in Columbia's name.

[5]A First Amended Complaint was filed by petitioner on July 11, 1990 pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

requested TRO and scheduled a hearing on petitioner's motion for a preliminary injunction for July 30, 1990. Prior to that hearing, OTS filed its own Complaint for Injunctive Relief seeking judicial enforcement of the Temporary Order under 12 U.S.C. § 1818(d).

The two issues raised at the outset by petitioner's complaint and request for injunctive relief involved pure questions of law: Was the "corrective" cease and desist order issued by OTS authorized by 12 U.S.C. § 1818(c)(1)? If it was authorized, did issuance of such an order without prior notice or a hearing and without an independent determination of probable validity violate due process? Although only issues of law were involved, OTS filed a series of declarations summarizing the allegations of the Notice of Charges and sought permission from the district court to conduct discovery on an expedited basis. Petitioner opposed the application for expedited discovery and argued that the district court need not consider factual contentions if it determined that OTS lacked statutory or constitutional authority to issue its Temporary Order. The district court agreed, precluded any discovery at that time and stated it would rule initially upon the legal challenges to the validity of the Temporary Order.

The District Court Hearing

At the hearing the district court consolidated petitioner's action to enjoin enforcement and OTS' action to enforce the Temporary Order pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and also ordered trial on the merits consolidated with the hearing on the motions for preliminary injunction pursuant to Federal Rules of Civil Procedure 65(a)(2). On August 6, 1990 the district court entered its Order Re Injunction, granting petitioner's motion to enjoin enforcement of the Tempo-

rary Order and denying OTS' parallel motion to enforce. See p. A-42, *infra*.[6]

The district court enjoined enforcement of the Temporary Order on each of the two grounds advanced by petitioner. First, the district court held that the Temporary Order exceeded OTS' statutory authority. Relying upon both "the plain meaning of the language of the statute" and its legislative history, the court held that section 1818(c)(1) authorized temporary orders requiring affirmative action to "prevent" ongoing or future harm to a savings institution or its depositors, but not interim orders directing affirmative action to "correct" the effects of past, allegedly unsafe and unsound practices. The Temporary Order requiring petitioner, who had resigned his position as Columbia's chief executive officer six months earlier, to make immediate restitution to Columbia was unauthorized "affirmative corrective order." See pp. A-49 to A-55, *infra*.

Second, the district court held that construction of the statute to permit the Temporary Order in this case would lead to an unconstitutional result. Since OTS' Temporary Order required petitioner "to surrender millions of dollars in cash and stock," the district court held that "the government cannot deprive Spiegel of these assets without due process of law." P. A-57, *infra*. Because the Temporary Order effected that deprivation without notice or any form of hearing and with no assurance that the agency's decision was not baseless or unwarranted, the district court concluded that, "even if the Temporary

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[6]On October 5, 1990 the district court entered an Amended Order Re Preliminary Injunction "to correct certain technical errors" in its prior order. See p. A-43, *infra*.

Order was authorized by the statute, it would be unconstitutional." P. A-61, *infra.*

Congressional Amendment Of The Statutory Scheme Following The District Court Decision

Respondents appealed the district court's order to the Ninth Circuit pursuant to 28 U.S.C. § 1291. While the appeal was pending, Congress enacted the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Title XXV of the Omnibus Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789. Section 2596 of the Crime Control Act, 104 Stat. 4908, amended 12 U.S.C. §§ 1818(b) and (c) to authorize OTS and other banking agencies to issue temporary orders requiring affirmative corrective relief, as well as preventive actions. The legislative history of this "technical amendment," as submitted by OTS to the Ninth Circuit in its Addendum to Supplemental Brief, expressly states that the statutory change was a direct response to the district court's opinion in this case.

The Court of Appeals' Decision

The Ninth Circuit entered its judgment and opinion reversing the district court's order and remanding the case on October 11, 1991. See p. A-22, *infra.* Counsel for both OTS and petitioner had agreed at oral argument before the Ninth Circuit that the 1990 statutory changes effectively overruled the district court's holding that the Temporary Order was not authorized by section 1818(c)(1).[7] (Although the July 5, 1990 Temporary Order exceeded OTS' then-existing statutory authority, as

[7]The Crime Control Act of 1990 was passed by Congress on October 27, 1990 — 10 days prior to oral argument — and signed into law on November 29, 1990.

the district court held, there is no doubt that OTS now has the statutory authority to issue a temporary order requiring affirmative action to correct the effects of past practices.) Nonetheless, the first portion of the Ninth Circuit's opinion (Norris, J.) is devoted to a detailed analysis and rejection of the argument that the Temporary Order in this case exceeded OTS' statutory power as it existed on July 5, 1990. See pp. A-12 to A-14, *infra*.

After concluding that the Temporary Order was statutorily authorized, the Ninth Circuit disapproved the district court's alternative holding that, if authorized by statute, the Temporary Order would constitute an unconstitutional prehearing deprivation of property. The court acknowledged the general rule that due process requires a hearing *before* a person may be deprived of his or her property. But in an opinion authored by Judge Norris, the court concluded that this case presented an "extraordinary situation" that justified postponing notice and an opportunity for a hearing and consequently that issuance of the Temporary Order did not violate due process.[8]

The Court of Appeals' opinion quoted the three factors held in *Fuentes v. Shevin*, 470 U.S. 67, 91 (1972), to be common to all cases in which prehearing deprivations have been upheld:

> "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over the monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining

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[8]The Ninth Circuit "assumed" that the Temporary Order deprived petitioner of his property. See p. A-15, *infra*.

> under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."

The court also quoted *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240 (1988), involving a bank official suspended from office by the FDIC following a grand jury indictment, which stated that "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." See p. A-16, *infra*.

After discussing these standards, the Ninth Circuit held that the Temporary Order served an important government interest and that, in authorizing temporary cease and desist orders, Congress had acknowledged a need for prompt action against officers and directors of troubled savings institutions who had been charged by the OTS with harmful conduct. The court disagreed with the district court's decision that OTS had failed to provide "substantial assurance that the deprivation is not baseless or unwarranted," and found that a "combination of factors" provided that assurance: The statute contained specific requirements that had to be met before an order could issue; the decision to issue the order was made by the head of the agency; and that decision was supported by "detailed findings . . . following a long examination by the OTS's examiners." See p. A-18, *infra*. Judge Norris' opinion rejected petitioner's argument that *Mallen* requires an independent institutional check (such as a grand jury indictment) to establish the probable validity of agency action depriving a person of property without a prior hearing. *Ibid.*

The Ninth Circuit also upheld the constitutional adequacy of the post-deprivation procedures afforded by the statutory scheme. The court found that the administrative hearing contemplated by the Notice of Charges is "sufficiently prompt" to satisfy due process. The opinion further notes that under section 1818(c)(2) a party served with a temporary order can apply to the district court for an injunction "setting aside, limiting or suspending the enforcement, operation, or effectiveness of such order." See p. A-21, *infra*. The court remanded the case to the district court to provide petitioner the opportunity to utilize this post-deprivation procedure to challenge the Temporary Order. P. A-22, *infra*.

The Concurring Opinion

Judge Rymer, joined by Judge Hall, wrote a separate opinion concurring with Judge Norris but also articulating a somewhat different analysis of the due process issue. Judge Rymer asserted that, although a temporary order is "effective" immediately under 12 U.S.C. § 1818(c)(1), it is not "enforceable" for 10 days. Because an individual in the position of petitioner has an opportunity pursuant to 12 U.S.C. § 1818(c)(2) to go to court during that 10-day period to ask a district court to set aside, limit or suspend the temporary order, and has a right to "full judicial review in the course of that proceeding," see p. A-23, *infra*, Judge Rymer reasoned that petitioner was not deprived of due process: "the statutory scheme provides adequate opportunity for judicial review such that we have no need to say that an independent or judicial screen in the circumstances of this case is unnecessary." See p. A-22, *infra*.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Authorization Of Asset Freeze And Restitution/Forfeiture Orders Without Notice Or A Hearing And With No Independent Determination Of Probable Validity Directly Conflicts With Decisions Of This Court And Vitiates Important Congressional Safeguards

The Ninth Circuit's decision upholding OTS' issuance of a Temporary Cease And Desist Order freezing petitioner's financial accounts with no predeprivation hearing or independent determination of probable validity creates a startling anomaly in the law of forfeitures and asset freezes: The financial accounts and assets of bank executives accused by a regulatory agency of unsafe or unsound business practices are entitled as a matter of due process to less protection than the proceeds of a drug peddler's illicit activities.

Suspected narcotics dealers accused of violating racketeering laws and creating continuing criminal enterprises may have certain assets frozen pending trial, but not before important procedural safeguards have first been satisfied: If no indictment has yet been filed, a temporary restraining order freezing proceeds from allegedly illegal conduct can be entered by the district court only if government prosecutors demonstrate to the court's satisfaction probable cause that the property is subject to forfeiture and that notice will jeopardize the availability of the property for forfeiture. 21 U.S.C. § 853(e)(2). If an indictment has first been returned by a grand jury charging an offense for which criminal forfeiture may be ordered, an *ex parte* restraining order may be issued by the district court without an additional showing of probable cause. *Id.* § 853(e)(1). See *United States v. Monsanto*, 924

F.2d 1186, 1192-93 & n.3 (2d Cir. 1991) (en banc); *United States v. Roth*, 912 F.2d 1131 (9th Cir. 1990).

According to the Ninth Circuit, however, former bank executives such as petitioner have no right either to a probable cause determination by a judicial officer or to the independent judgment of a grand jury or other comparable neutral body before their assets may be seized. A Temporary Order freezing financial accounts, as well as directing immediate restitution (forfeiture) of all sums at issue, can be entered under this decision based solely upon the unreviewed judgment of the government agency responsible for prosecuting the administrative proceeding against petitioner. That decision directly conflicts with well-established principles of due process enunciated by this Court. The Ninth Circuit decision also ignores Congress' carefully balanced legislative scheme permitting pretrial asset freeze and forfeiture orders only after an independent or judicial determination of probable validity, as set forth for example in the Comprehensive Forfeiture Act of 1984 and the Racketeer Influenced and Corrupt Organization Act ("RICO"), as well as the more recent Crime Control Act of 1990, which amended the statutes governing OTS' activities. By permitting OTS to issue the Temporary Order, the Ninth Circuit has rendered this entire legislative scheme superfluous.

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES REQUIRING EITHER A PREDEPRIVATION HEARING OR AN INDEPENDENT DETERMINATION OF PROBABLE VALIDITY.

A. The Temporary Order Deprived Petitioner Of Property Without Notice Or A Hearing

The Temporary Order approved by the Ninth Circuit immediately deprived petitioner of the use of his assets and, under threat of daily fines escalating to $1 million-per-day for violation,[9] directed him within 24 hours to reimburse Columbia or its successor in a sum of approximately $19 million and to deposit an additional sum in excess of $2 million as a "guarantee against loss." See pp. A-65 to A-67, A-69, *infra*. Because it directly interferes with petitioner's enjoyment of his property, the Temporary Order is a "taking" subject to the requirements of the Due Process Clause of the Fifth Amendment. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) ("that the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause"); *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972) ("a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment").

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[9]OTS is authorized to impose civil penalties under 12 U.S.C. § 1818(i)(2) for violations of a temporary order whether or not the agency ever seeks judicial enforcement of the order. Those penalties start at $5,000 per day, but can increase to $1 million per day for "knowing" violations causing "substantial loss" to a depository institution. *Id.* § 1818(i)(2)(C).

The Ninth Circuit's reluctance to classify unequivocally OTS' Temporary Order as a deprivation of property is misplaced. (See p. A-15 & n.5, *infra.*) As this Court recognized in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, *supra*, even the temporary loss of the use of a bank account through garnishment is a "deprivation" subject to the requirements of due process of law. In this case, upon service of the Temporary Order petitioner lost all use of his funds on deposit at financial institutions and brokerage firms. Not only was petitioner himself ordered not to withdraw such funds, but OTS also immediately notified financial institutions at which petitioner maintained accounts that he was prohibited "from directly or indirectly withdrawing or transferring or attempting to withdraw or transfer funds or assets."[10]

The Ninth Circuit's approval of the Temporary Order effects this deprivation of petitioner's property rights without prior notice or opportunity to be heard in direct

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[10]The concurring opinion's distinction between the time a Temporary Order becomes "effective" and the time it is "enforceable" is neither supported by the statutory language nor of any constitutional significance. Although petitioner had 10 days following service of the Temporary Order to apply to the district court for an injunction limiting or suspending its enforcement under section 1818(c)(2), OTS is not obligated to wait 10 days before seeking an injunction to enforce the Temporary Order pursuant to section 1818(d). Such an injunction is available as soon as OTS believes there is a "threatened violation" of its Temporary Order. Indeed, in this case the chief counsel for OTS advised the district court at the hearing on petitioner's application for a TRO that he had intended to apply for an injunction that very day (a mere 24-hours after the order had been issued and served). Moreover, because the Temporary Order "shall become effective upon service," 12 U.S.C. § 1818(c)(1), petitioner was immediately barred from any use of his financial accounts under threat of civil penalty. That deprivation occurred whether or not OTS ever sought judicial enforcement of the Temporary Order.

contravention of the most fundamental principle of due process. *E.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540 (1985) ("the root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest") (emphasis in original; internal quotation marks omitted); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). *See generally Mathews v. Eldridge*, 424 U.S. 319, 335, 349 (1976) (adequacy of pre-seizure procedures to be evaluated by a "flexible" balancing test; here claimant was provided with an "effective process for asserting his claims prior to any administrative action"). In upholding the Temporary Order, the Ninth Circuit invoked the limited exception, recognized in *Fuentes v. Shevin*, *supra*, and *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988), for summary administrative action in certain extraordinary circumstances. With its overly generous application of that "limited" exception, however, the Ninth Circuit has substantially broadened the power of administrative agencies to seize property without regard to the safeguards erected by this Court to protect against unwarranted deprivations.

B. No Emergency Situation Justified This Prehearing Deprivation

Summary administrative action is justified only in truly "emergency situations." *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 299-300 (1981). As set forth in *Fuentes* (and quoted by the Ninth Circuit), three conditions must be met to justify a seizure without a prior hearing: (1) the seizure must be "directly necessary" to secure an important government interest; (2) there must be a "special need for very prompt action"; and (3) the State must retain strict control, pursuant to a narrowly drawn statute, over its monopoly of legitimate force. 407

U.S. at 90-91. Here, the Court of Appeals failed to require *any* showing that the Temporary Order was necessary to deal with an "emergency situation," instead relying upon a general observation of the importance of fighting insider abuse at savings and loan institutions, and noting "the gravity of the charges against Spiegel." See p. A-17, *infra*.

In fact, no special need existed for expedited, *ex parte* agency action against petitioner. The charges had been the subject of investigation by OTS and an internal examination at Columbia for more than six months prior to issuance of the Temporary Order. Petitioner, who had resigned his position at Columbia months earlier, participated extensively in that examination through his counsel. In finding a "special need for very prompt action," the Ninth Circuit simply ignored these circumstances. The Second Circuit, on the other hand, has recognized in forfeiture cases that the government's own actions directed toward a defendant are relevant in assessing the validity of its claim of extraordinary circumstances to support postponement of notice and the opportunity for a hearing. *United States v. Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265 (2d Cir. 1989) (claim of exigent circumstances belied by government's institution of forfeiture proceedings more than six months after conducting thorough search pursuant to warrant of premises seized without prior hearing).

C. No Independent Check On Agency Action Existed To Assure That The Asset Seizure Was Warranted

More fundamentally, the Ninth Circuit improperly dismissed the reasoning of this Court's only recent application of the "emergency situation" doctrine in the context of federal regulatory oversight of the nation's banking and thrift system, *FDIC v. Mallen*, *supra*. In *Mallen* the

Court upheld the constitutionality of 12 U.S.C. § 1818(g)(1), the statutory provision authorizing an appropriate federal banking agency — in that case, the FDIC — to suspend from office an indicted bank official. (Section 1818(g) is part of the same statutory scheme that provides authorization for OTS' Temporary Order in this case.) Approving suspension of the bank official without first providing him an opportunity to be heard, this Court held:

> "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." 486 U.S. at 240, citing *inter alia*, *Barry v. Barchi*, 443 U.S. 55, 64-66 (1979), and *Dixon v. Love*, 431 U.S. 105, 112-115 (1977).

After defining the important government interest at stake (preserving public confidence in our banking institutions), the Court described in detail the independent findings that gave assurance that the FDIC's order of suspension was not unwarranted:

> "A grand jury had determined that there was probable cause to believe that appellee had committed a felony. Such an ex parte finding of probable cause provides a sufficient basis for an arrest, which of course constitutes a temporary deprivation of liberty. It should certainly be sufficient, when coupled with the congressional finding that a prompt suspension is important to the integrity of our banking institutions, to support the order entered in this case on January 20, 1987, even though the FDIC did not provide appellee with a separate pre-suspension hear-

> ing." 486 U.S. at 241 (citations and footnote omitted).

Unlike the statutory provision upheld in *Mallen*, section 1818(c)(1) as construed by the Ninth Circuit provides no independent or outside check that assures the propriety of OTS' decisions or restrains the agency from arbitrary action. In *Mallen* the agency's decision alone was not enough:

> "The finding of probable cause by an *independent body* demonstrates that the suspension is not arbitrary." 486 U.S. at 244 (emphasis added).

Similarly, in *Barry v. Barchi*, 443 U.S. 55, (1979), and *Dixon v. Love*, 431 U.S. 105 (1977), both cited with approval on this point in *Mallen*, the prehearing deprivation was not wholly discretionary with the agency head, but was coupled with an objective determination by an independent person or entity that was functionally equivalent to the grand jury indictment in *Mallen* — in *Barry* a determination by a state testing official, using prescribed procedures, that Barchi's horse had in fact been drugged, 443 U.S. at 65; in *Dixon* a showing from official records that Love's license had been previously suspended three times in 10 years. 431 U.S. at 113. No such independent, objective safeguards exist here.

The Ninth Circuit concedes, as it must, that this Court in *Mallen* relied upon the independent evaluation of the grand jury to provide "substantial assurance" that the FDIC suspension was not baseless. Yet the reasoning of *Mallen* is inexplicably rejected. The court simply asserts that such an independent institutional check is not necessary in the present case, see p. A-18, *infra*, and notes that this Court in its earlier decision in *Fuentes v. Shevin*, "made no reference to an external check on the official's

action." See p. A-19, *infra*.[11] In *Fuentes*, of course, the Court *invalidated* two States' summary repossession statutes because no predeprivation hearing was provided:

> "[T]he Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. . . . '[D]ue process is afforded only by the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable validity of the underlying claims against the alleged debtor *before* he can be deprived of his property. . . .'" *Fuentes v. Shevin*, *supra*, 407 U.S. at 96-97, quoting Harlan, J., concurring in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (emphasis in original).

Without meaningful analysis the Ninth Circuit has thus created a dangerous precedent that gives unwarranted encouragement to the aggressive enforcement activities of government thrift regulators. It is a precedent directly in conflict with this Court's decision in *FDIC v. Mallen* and renders recent congressional legislation superfluous, as discussed below. In light of the importance of the question and the prevalence of similar actions by regulators throughout the country, see, *e.g.*, *Paul v. Office of Thrift Supervision*, 763 F.Supp. 568 (S.D.Fla. 1990), *aff'd without opinion per curiam sub nom. Paul v. Ryan*, No. 90-6016, 1991 U.S.App. Lexis 26832 (11th Cir. November 6, 1991) (upholding issuance of OTS temporary cease and

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[11]Although she did not expressly disagree with Judge Norris' opinion for the Court, in her concurring opinion Judge Rymer stated that there was "no need to say that an independent or judicial screen in the circumstances of this case is unnecessary." See p. A-22, *infra*.

desist order), plenary consideration at this time is essential.

II.

THE NINTH CIRCUIT'S DECISION IGNORES, AND IS INCONSISTENT WITH, THE CONGRESSIONAL SCHEME FOR IMPOSITION OF PRETRIAL ASSET FREEZE AND FORFEITURE ORDERS

Congress has devoted considerable attention to providing government prosecutors with the power to freeze assets and to effect forfeitures, including the ability to obtain restraining orders *pendente lite*. Although recognizing the government's legitimate need to act quickly in extraordinary situations, Congress has been careful not to ignore a defendant's procedural rights, even those of a defendant accused of narcotics violations and racketeering offenses. Instead, the statutes authorizing immediate freeze and forfeiture orders create a workable balance, consistent with the mandate of due process of law, that confirms the government's ability to respond to emergencies while protecting a defendant against unwarranted deprivations of property. The Ninth Circuit's decision wholly ignores that sensitive legislative balance and, as a result, threatens to subvert clear congressional intent recognizing the need for an independent determination of probable validity before assets are attached or frozen.

The congressional balancing of prosecutors' powers and defendants' rights is nowhere more clearly stated than in section 2521(b)(1) of the Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, 4864, which amended section 8(i) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i), to grant OTS and other federal banking agencies the power to obtain the type of asset

freeze order attempted by the Temporary Order at issue in this case:

"(b) Prejudgment Attachments.

"(1) Appropriate Federal Banking Agencies. Section 8(i) . . . is amended by adding at the end the following new paragraph:

'(4) Prejudgment Attachment.

'(A) In General. In any action brought by an appropriate Federal banking agency . . . pursuant to this section, or in actions brought in aid of, or to enforce an order in, any administrative or other civil action for money damages, restitution, or civil money penalties brought by such agency, the court may, upon application of the agency, issue a restraining order that —

'(i) prohibits any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property; and

'(ii) appoints a temporary receiver to administer the restraining order.

'(B) Standard. A permanent or temporary injunction or restraining order shall be granted without bond upon a prima facie showing that money damages, restitution, or civil money penalties, as sought by such agency, is appropriate.' "[12]

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[12]As discussed at note 7, above, the Crime Control Act of 1990 had been passed by Congress prior to oral argument in the Ninth Circuit. OTS specifically advised the Court of Appeals of the Act's enactment in a Supplemental Brief, and both parties discussed the Act during argument.

Under amended section 1818(i)(4) OTS can seek a restraining order freezing assets "in aid of" an administrative enforcement action initiated by a Notice of Charges, but the issuance of such an order is discretionary with the court, rather than being governed by the unreviewed judgment of the agency itself. In exercising its discretion before any deprivation occurs, the court is to consider OTS' likelihood of success on the merits — that is, the court is to make an independent assessment of the probable validity of the allegations asserted. The Ninth Circuit's decision, permitting OTS to issue a Temporary Order directing a freeze of petitioner's financial accounts without any predeprivation judicial review, effectively nullifies this legislation and the procedural protections it affords banking officials in the position of petitioner.

The same statutory protections are also present in Congress' more sweeping legislation dealing with asset freezes and forfeitures, the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853. That section authorizes an *ex parte* asset freeze only (a) after an indictment has been filed, providing the same independent determination of probable validity present in *Mallen*, 21 U.S.C. § 853(e)(1)(A); or (b) "if the United States demonstrates [to a magistrate or district judge] that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture." *Id.* § 853(e)(2).

These statutory schemes, which postpone the requirement of a hearing only if a predeprivation determination of probable validity has been made by a district court or federal grand jury, were simply disregarded by the Ninth

Circuit in approving OTS' self-justifying, self-executing Temporary Order. *See also* 18 U.S.C. § 1963(d), providing the same protections to a defendant in a criminal RICO prosecution. Review by this Court is necessary to reconcile this clear congressional mandate with the Ninth Circuit's inconsistent interpretation of OTS' authority under 12 U.S.C. § 1818(c)(1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 9, 1992

APPENDIX

STATUTES INVOLVED

12 U.S.C. § 1818(b), "*Cease-and-desist proceedings*," as amended by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), Pub. L No. 101-73, 103 Stat. 183 (1989), provided:

> "(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof . . .
>
> " . . . .
>
> "(6) Affirmative action to correct conditions resulting from violations or practices. — The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to —

"(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if —

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

"(B) restrict the growth of the institution;

"(C) dispose of any loan or asset involved;

"(D) rescind agreements or contracts; and

"(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

"(F) take such other action as the banking agency determines to be appropriate."

12 U.S.C. § 1818(b)(6), as further amended by section 2596(a) of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Title XXV of the Omnibus Crime Control Act of 1990, Pub. L 101-647, 104 Stat. 4789, 4908, now provides in part (new language underscored):

"(6) Affirmative action to correct conditions resulting from violations or practices. — The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct <u>or remedy</u> any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to

require such depository institution or such party to . . . ."

12 U.S.C. § 1818(c)(1), as amended by FIRREA, provided:

"(c) Temporary cease-and-desist orders

"(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of the subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6)(B) of this section. Such order shall become effective upon service upon the depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such

notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order."

As amended in 1990 by section 2596(b) of the Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, 4908, section 1818(c)(1) now reads (new language underscored):

"(c) Temporary cease-and-desist orders

"(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent or remedy such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6) of this section. Such order shall become effective upon service upon the depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and

enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order."

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS SPIEGEL,
Plaintiff-Appellee,

v.

TIMOTHY RYAN; DEPT. OF TREASURY;
OFFICE OF THRIFT SUPERVISION,
Defendants-Appellants.

No. 90-55942
D.C. No. CV-90-3520
OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
November 7, 1990 — Pasadena, California

Filed October 11, 1991

Before: William A. Norris, Cynthia Holcomb Hall and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Norris; Concurrence by Judge Rymer

SUMMARY

Constitutional Law/Banking and Finance

Reversing and remanding a district court judgment permanently enjoining a temporary order by the Office of Thrift Supervision (OTS) requiring the payment of restitution, the court of appeals held that the OTS had the statutory authority to issue the temporary restitution

order without depriving the former chairman of a banking institution of due process.

The Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") created the Office of Thrift Supervision to take over many of the tasks previously handled by the Federal Home Loan Bank Board, which the statute abolished. The OTS issued a temporary cease and desist order requiring a former officer of a savings and loan association to make restitution to the institution pending an administrative hearing to determine whether a permanent cease and desist order should issue. The former bank director filed an action in federal court, seeking injunctive relief from the temporary order by arguing that 12 U.S.C. § 1818(c)(1)((c)(1)), the statutory provision authorizing the OTS to issue temporary cease and desist orders, does not authorize the OTS to order restitution as a temporary remedy. The district court permanently enjoined the OTS from enforcing the order.

[1] The court agreed that (c)(1) on its face gives it the power to issue temporary cease and desist orders for the protection of banking institutions and its depositors. [2] In addition, 12 U.S.C. § 1818(b)(6) supported the conclusion that the OTS has the authority to order restitution in a (c)(1) temporary order. [3] Restitution may not only compensate an institution for past wrongs, but may also serve to prevent the dissipation of assets that may belong to it, and thereby prevent prejudice to its depositors.

[4] The court disagreed that the temporary order violated the due process clause. [5] While as a general rule, due process requires a hearing before a person may be deprived of her property, outright seizure without opportunity for a prior hearing is permitted under a few limited

situations. The court determined whether the three *Fuentes* factors common to all cases in which the Supreme Court has upheld prehearing deprivations were present in this case. [6] The court agreed that the temporary order satisfied the *Fuentes* important governmental interest prong. [7] The court also held that the temporary order satisfied the *Fuentes* "special need for very prompt action" prong. [8] However, the court disagreed with the district court's decision that the temporary order did not provide "substantial assurance that the deprivation was not baseless or unwarranted." Therefore, the court held that the OTS's prehearing deprivation of property did not violate due process under *Fuentes*. [9] The statute in question provided sufficient due process because it mandated a full postdeprivation hearing subject to judicial review.

Concurring, Judge Rymer wrote separately to express the view that the statutory scheme provides adequate opportunity for judicial review. Judge Rymer saw no need to say that an independent or judicial screen under the circumstances of this case was unnecessary.

COUNSEL

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Dennis M. Perluss and Dan Marmalefsky, Hufstedler, Kaus & Ettinger, Los Angeles, California, for the plaintiff-appellee.

OPINION

NORRIS, Circuit Judge:

In 1989 Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"),

Pub. L. No. 101-73, 103 Stat. 183 (1989). Among other things, FIRREA created the Office of Thrift Supervision ("OTS") to take over many of the savings and loan regulatory tasks previously handled by the Federal Home Loan Bank Board, which the statute abolished. Congress also armed the OTS with expanded powers to deal with the crisis that had gripped the nation's savings and loan industry. In this appeal we resolve a dispute over the OTS's statutory authority to issue a temporary cease and desist order requiring a former officer of a savings and loan association to make restitution in the sum of $21 million pending an administrative hearing to determine whether a permanent cease and desist order should issue. We also consider whether the Temporary Order constituted a prehearing deprivation of property that violated due process of law.

I

On November 28, 1989, the OTS launched a formal investigation of Columbia Savings and Loan Association ("Columbia")[1] and Thomas Spiegel ("Spiegel"), its former chairman and chief executive officer. On July 5, 1990, the OTS issued a "Notice of Charges and Hearing and Notice of Intention to Remove and Prohibit, and to Direct Restitution, and Notice of Assessment of Money Penalty" ("Notice of Charges"). This notice, *inter alia,* alleged that Spiegel misappropriated corporate assets and committed other violations of banking laws, and set September 4, 1990 as the date for the commencement of an administrative hearing to determine whether the OTS should issue a permanent cease and desist order against Columbia

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[1]Columbia is a state-chartered, publicly-held savings association with its principal place of business in Beverly Hills, California.

and/or Spiegel. On the same day, the OTS issued a "Temporary Order to Cease and Desist" (the "Temporary Order"), which required Spiegel, *inter alia,* to make restitution to Columbia in the amount of approximately $21 million, by no later than 12 o'clock noon the next day, July 6. The Temporary Order provided that this restitution could be accomplished by a cash payment to Columbia, the establishment of an escrow account, or the posting of a letter of credit or bond.

On July 6, Spiegel filed a complaint in the United States District Court for the Central District of California seeking injunctive relief from the Temporary Order. He argued to the district court that 12 U.S.C. § 1818(c)(1) ("(c)(1)"), the statutory provision authorizing the OTS to issue temporary cease and desist orders, does not authorize the OTS to order restitution as a temporary remedy.[2] In making this argument, he relied on the following language in (c)(1):

> [The OTS] may issue a temporary order requiring [a] party to cease and desist from any . . . violation

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[2]The OTS's authority to issue temporary cease and desist orders rests on 12 U.S.C. § 1818(c)(1), which read, at the time the temporary order issued, in relevant part, as follows:

> Whenever the [OTS] shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the [N]otice of [C]harges . . . is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to [permanent cease-and-desist order proceedings], [the OTS] may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include

> or practice [specified in § 1818(b)(1)] and to take affirmative action to *prevent* such insolvency [of the institution] dissipation [of its assets], [weakening of its] condition or prejudice [to its depositors] pending completion of . . . proceedings [pursuant to (b)(1)].

(emphasis added).

Spiegel reads this language in (c)(1) as restricting the OTS's (c)(1) authority to ordering only "preventive" remedies, which he interprets to mean orders designed to prevent future or ongoing harm to the institution. Restitution does not qualify as such a remedy, he contends, because it is a remedy designed to correct past harm. In the alternative, Spiegel argues that, if (c)(1) is interpreted as authorizing the OTS to require restitution in the Temporary Order, the statute authorizes a prehearing deprivation of his property that violates due process.

In response to Spiegel's complaint, the OTS moved for a preliminary injunction enforcing the Temporary Order. The district court denied the OTS's motion and instead permanently enjoined the OTS from enforcing the order. The court agreed with Spiegel that (c)(1) did not authorize the OTS to require restitution in a temporary cease and desist order and held, in the alternative, that if (c)(1) were interpreted to grant that authority, such an order would violate due process.

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any requirement authorized under subsection (b)(6)(B) of this section. Such order shall become effective upon service upon the depository institution or such institution-affiliated party [such as Spiegel] and, unless set aside, limited, or suspended by a court in proceedings authorized by [12 U.S.C. § 1818(c)(2)], shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice . . . .

We respectfully disagree with the district court on both issues. Rather, we agree with the OTS both that (c)(1) authorized it to issue the temporary restitution order and that the order did not deprive Spiegel of due process of law.

II

[1] As the OTS explains, (c)(1) on its face gives it the power to issue temporary cease and desist orders requiring "affirmative action to prevent . . . dissipation [of an institution's assets] or prejudice [to its depositors]." As a matter of common sense, the $21 million in restitution required by the Temporary Order, however satisfied, strengthens Columbia's financial condition by preserving Spiegel's assets, and thereby tends to achieve at least two of the statutory goals set forth in (c)(1), namely, the prevention of the dissipation of assets which might belong to Columbia, and the resulting prejudice to Columbia's depositors.

[2] Moreover, the plain language of 12 U.S.C. § 1818(b)(6) ("(b)(6)") supports our conclusion that the OTS has authority to order restitution in a (c)(1) temporary order. Subsection (b)(b) provides that "the authority to issue an order under this subsection [(b)] *and subsection (c)* of this section which requires . . . any institution-affiliated party to take affirmative action to *correct* any conditions resulting from any violation . . . includes the authority to . . . —(A) make restitution . . . ." 12 U.S.C. § 1818(b)(6) (emphasis added). Thus, the plain, unqualified language of (b)(6) expressly authorizes restitution as a remedy under "subsection (c)."

Spiegel argues that, in unqualifiedly referring in (b)(6) to "subsection (c)," Congress did not really mean "subsection (c)," but instead meant "subsec-

tion (c)(3)(A)(ii)."[3] Spiegel offers the explanation that Congress intended "subsection (c)" to mean "subsection (c)(3)(A)(ii)" because (b)(6) and (c)(3)(A)(ii) were enacted at the same time as part of FIRREA. Besides contradicting the plain language of both (b)(6) and (c)(1), Spiegel's interpretation renders (b)(6)'s reference to "section (c)" redundant. Under his interpretation, the reference in (b)(6) to subsection (c) would be meaningless, because subsection (c)(3)(A)(ii) itself explicitly authorizes the OTS to issue temporary orders restoring an institution's books and records. *See United States v. Fields*, 783 F.2d 1382, 1384 (9th Cir. 1986) (statutes should be interpreted to give full meaning to all provisions); *see also 2A Sutherland Statutory Construction* § 46.06 (4th ed. 1984) (same).

[3] Spiegel also attempts to evade the plain meaning of the language in (c)(1) and (b)(6) by arguing that the use of the word "prevent" in (c)(1) makes restitution unavailable as a remedy because restitution is a remedy that *corrects* past wrongs, not a remedy that *prevents* new ones. This argument overlooks the OTS's compelling point that restitution may not only compensate an institution for past wrongs, but may also serve to prevent the dissipation of assets that may belong to it, and thereby prevent prejudice to its depositors.

As a corollary of his argument, Spiegel cites the fact that (b)(6) conversely uses the word "correct" instead of "prevent" in referring to restitution as a remedy. In our view, the contrast between the use of the word "correct"

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[3]Subsection (c)(3)(A)(ii) authorizes the OTS to issue a temporary order requiring "affirmative action" to restore a financial institution's books or records "to a complete and accurate state" when the institution's books are so incomplete that the federal agency cannot determine its financial condition.

in (b)(6) and "prevent" in (c)(1), especially when considered in the context of (b)(6)'s plain language authorizing restitution for orders issued under subsection (c), lends no support to Spiegel's argument that we should disregard that plain language and read it as denying the OTS authority to require restitution in temporary orders.

Spiegel's attempt to interpret (b)(6) as *restricting* the OTS's powers under (c)(1) becomes even more implausible when we consider that FIRREA, which added (b)(6) to the statute, was enacted to "enhance[ ] the enforcement powers of the [federal] regulators" to deal with insider abuses leading to "the highest number of [financial institution] failures since the great depression" by clarifying and strengthening "the reach of those authorities to administer enforcement orders." H.R. Rep. No. 5094, 101st Cong. 1st Sess., 134 Cong. Rec. 65, 138-40 (1988). Spiegel's interpretation of (b)(6) would constrict the OTS's enforcement powers precisely when Congress was bent on strengthening the powers of federal regulators to deal with the savings and loan crisis.

We agree, then, with the OTS that (c)(1) authorizes temporary orders requiring restitution. We turn, therefore, to Spiegel's argument, accepted by the district court, that the temporary cease and desist order violated due process because it constituted an unwarranted prehearing deprivation of his property.[4]

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[4]Spiegel argues that we should avoid reaching the due process question by adopting his interpretation of the statute. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") This well-known principle of judicial restraint

III

[4] The Temporary Order required that Spiegel make restitution in an amount exceeding $21 million, or else face daily-accruing money penalties. The order gave him the option of paying Columbia cash, establishing an escrow account, or posting a bond or letter of credit, pending the outcome of the administrative proceedings determining whether the OTS would issue a permanent order. The district court held that the Temporary Order violated the due process clause. We disagree.

The district court began its due process analysis by holding that the Temporary Order deprived Spiegel of his property. The next step in the inquiry, assuming a prehearing deprivation occurred, is determining "what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). We assume that the Temporary Order amounts to a prehearing deprivation of property[5] and conduct the due process inquiry.

A

[5] Spiegel argues that he was entitled to a predeprivation hearing. As a general rule, it is true that due process requires a hearing before a person may be deprived of her property. *See Fuentes v. Shevin*, 470 U.S. 67, 90 (1972). "[I]n a few limited situations," however, the Supreme Court has "allowed outright seizure without opportunity for a prior hearing." *Id.* at 90-91. We must

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is inapplicable here because Spiegel's interpretation of the statute is "plainly contrary to the intent of Congress." *Id.*

[5]Because we held that the Temporary Order did not violate due process, even assuming a deprivation occurred, we need not decide whether the district court erred in deciding that the Temporary Order effected a deprivation.

determine, then, whether this case presents an "'extraordinary situation[ ]' that justif[ies] postponing notice and opportunity for a hearing." *Id.* at 90.

Fuentes listed three factors common to all cases in which the Court has upheld prehearing deprivations:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over the monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. at 91. We analyze this case to determine whether the three *Fuentes* factors are present here. Our analysis is also guided by *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988), which teaches that "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.* at 240.

[6] Applying *Mallen*, the district court held that the Temporary Order served an important government interest, which Congress identified as fighting insider abuse of savings institutions in order to maintain the integrity of savings and loan institutions, as well as to protect the public fisc, which, because of deposit insurance, is obligated to make good on most of the deposits in those institutions. *See, e.g.*, H.R. Rep. No. 54(I), 101st Cong. 1st Sess. 307, *reprinted in* 1989 *U.S. Code Cong. & Admin.*

News at 103; H.R. Conf. Rep. No. 222, 101st Cong. 1st Sess. 393, *reprinted in 1989 U.S. Code Cong. & Admin. News* at 432. We agree with the district court and hold that the Temporary Order satisfies the *Fuentes* "important governmental interest" prong.

[7] We also agree with the district court that Congress, in authorizing temporary restitution orders pending an administrative hearing, acknowledged a need for prompt action against officers and directors formally charged by the OTS with misconduct harmful to a troubled savings institution. In this case, the temporary restitution order was based upon findings by the OTS's examiners that Spiegel caused Columbia to lend $28 million to a personal friend without adequate collateral, resulting in a loss to Columbia of $5 million, and that he caused Columbia to purchase four condominiums, a jet airplane and a collection of 100 guns, all for his personal enjoyment. In addition, he was charged with accepting inflated compensation, including a $2.4 million bonus in 1989. A year later, shortly after his departure as chairman and chief executive officer, Columbia's financial condition had deteriorated to the point that it was insolvent in the amount of $215 million. In light of the gravity of the charges against Spiegel, it was not unreasonable for the OTS to issue the Temporary Order simultaneously with the Notice of Charges in order to avoid the risk that he would dissipate his assets or attempt to put them beyond the government's reach. As a result, we hold that the Temporary Order also satisfies the *Fuentes* "special need for very prompt action" prong.

[8] We disagree, however, with the district court's decision that the Temporary Order did not provide "substantial assurance that the deprivation is not baseless or unwarranted." *Mallen*, 486 U.S. at 240. Rather, we agree

with the OTS that "substantial assurance" that the charges were not "baseless or unwarranted" was provided by a combination of factors: the OTS was required to meet specific statutory requirements before issuing the order, the decision to issue the order was made by the head of the agency expert in these matters, and his decision was supported by detailed findings of Spiegel's misconduct following a long investigation by the OTS's examiners, the results of which were submitted to the district court under penalty of perjury.

Spiegel's only response to the OTS's "substantial assurance" argument is his claim that *Mallen* requires an independent institutional check on agency action depriving a person of property without a prior hearing. Because the OTS issued the Temporary Order solely on the basis of its own internal examination of Speigel's conduct as chairman and chief executive of Columbia, he contends that the order violated due process. We reject this argument because we do not read *Mallen* as requiring an independent verification of agency action to satisfy the "substantial assurance" test.

In *Mallen*, the Court rejected a due process challenge to an order of the Federal Deposit Insurance Corporation suspending a bank officer without a hearing. In finding that the "substantial assurance" test was satisfied on the facts of that case, the Court relied upon the fact that the target of the suspension order was already under indictment for violating banking laws. Although the grand jury's determination that reasonable grounds existed for believing the officer had violated banking laws provided "substantial assurance" that the FDIC's action was not baseless, nothing in *Mallen* suggests that the Court intended to require an independent institutional check in

every prehearing deprivation case.[6] In other words, the fact that the grand jury indictment was sufficient to satisfy the "substantial assurance" test on the facts of *Mallen* does not mean that an independent institutional check is necessary in every case.

Indeed, in articulating the factors shared by cases upholding prehearing deprivations, *Fuentes* made no reference to an external check on the official's action. Rather, *Fuentes* held that a state statute authorizing the issuance of prehearing writs of replevin would be constitutional if the responsible official determined, "under the standards of a narrowly-drawn statute, that [the prehearing seizure] was necessary and justified in the particular instance." 407 U.S. at 91. Moreover, in the cases cited by *Fuentes*, prehearing deprivations were upheld without any suggestion of a requirement of an independent check. *See Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950) (upholding government authority to seize misbranded health products); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (upholding government authority to appoint conservator for savings and loan institutions); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (upholding government authority to collect corporate taxes from shareholders of dissolved corporation); *Stoehr v. Wallace*, 255 U.S. 239 (1921) (upholding government authority to seize enemy property); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (upholding government authority to seize and destroy infected food).[7] We thus reject Spiegel's argument that the Temporary Order vio-

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[6]Similarly, nothing in *Barry v. Barchi*, 443 U.S. 55 (1979), or *Dixon v. Love*, 431 U.S. 105 (1977), both cited by Spiegel, suggests that an independent check is required.

[7]These cases are cited in *Fuentes*, 407 U.S. at 92 nn.24-28.

lates due process because it was based solely on the OTS's internal investigation of Spiegel's conduct.

Under *Fuentes*, however, we must consider whether the statutory scheme has sufficiently tight standards to channel the agency's discretion. On this issue, we find helpful guidance in *Mallen* and *Fahey*, which involved criteria similar to those in 12 U.S.C. § 1818(c)(1). Under the statute that passed muster in *Mallen*, the agency could suspend an indicted banking official "if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank . . . ." 12 U.S.C. § 1818(g)(1) (Supp. V 1981), *quoted in Mallen*, 486 U.S. at 234 n.5. The Rules and Regulations for the Federal Savings and Loan System at issue in *Fahey* provided for appointment of a conservator whenever the Federal Home Loan Bank Administration believed a savings and loan association was "conducting its business in an unlawful or unsafe manner," was "in an unsound or unsafe condition," could not "with safety continue in business" or was "pursuing a course that is jeopardizing or injurious to the interests of its members, creditors or the public," among other things. 24 C.F.R. Cum. Supp. § 206.1 et seq., as amended, 24 C.F.R. 1943 Supp. § 206.1, *quoted in Fahey*, 332 U.S. at 250-53 n.1. These statutory standards are not materially different from those guiding the OTS in determining that a party it believes has engaged in an unsafe or unsound practice "is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, . . . weaken the condition of the depository institution or otherwise prejudice the interests of its depositors," as it must before issuing a temporary order. *See* 12 U.S.C. § 1818(b)(1) & (c)(1). Given the industry involved, and the degree of regulation that exists in that industry, the standards in (c)(1) are not constitutionally

impermissible. *See Fahey,* 332 U.S. at 250-254; *cf. Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.,* 452 U.S. 264, 299-303 (1981) (reasoning that statutory and regulatory criteria are specific enough to insulate immediate mining cessation order from due process challenge).

We, therefore, conclude that the State in this case "has kept strict control over its monopoly of legitimate force," *Fuentes,* 407 U.S. at 91, and hold that the OTS' prehearing deprivation of property does not violate due process under *Fuentes.*

B

[9] Having concluded that due process does not entitle Spiegel to a predeprivation hearing, we must still determine whether the statute provides due process. Since the statute here mandates a full postdeprivation hearing subject to judicial review, the sole question is whether, under *Mallen,* the postdeprivation hearing is "sufficiently prompt." *Mallen,* 486 U.S. at 241. Spiegel does not dispute the promptness of the postdeprivation hearing. Even if he had advanced that argument, however, his contention would have failed. The statute provides for a prompt administrative hearing, no later than sixty days from the notice of charges and temporary order. *See* 12 U.S.C. § 1818(b)(1). Section 1818(c)(2) further provides the party who has been served with the opportunity to seek, within ten days of the temporary order's issuance, an injunction "setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order." 12 U.S.C. § 1818(c)(2).[8] The statute we upheld in *Mallen*

[8]Spiegel argues that safeguards are inadequate because when the government goes to court to enforce its order, the statute contains mandatory language: the district court "shall" issue an injunction

did not even provide for such an opportunity for judicial review prior to the administrative hearing. It merely required an administrative hearing within thirty days of a written request and a written decision within sixty days of the hearing. We therefore hold that, under *Mallen*, the statute affords Spiegel adequate process. *Morrissey*, 408 U.S. at 481.

IV

In light of the foregoing, we hold that the issuance of a Temporary Order did not violate due process. Accordingly, the judgment of the district court permanently enjoining the Temporary Order is REVERSED, and the case is REMANDED to the district court to decide whether Spiegel is entitled to subsection (c)(2) injunctive relief on the merits or whether the OTS is entitled to an order enforcing its Temporary Order.

RYMER, Circuit Judge, with whom HALL, Circuit Judge, joins, concurring:

I concur, but write separately to express my view that the statutory scheme provides adequate opportunity for judicial review, such that we have no need to say that an independent or judicial screen in the circumstances of this case is unnecessary.

When issued, the temporary order is only "effective," 12 U.S.C. § 1818(c)(1) — it is not "enforceable" until ten

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enforcing the order if the court determines that there has been a "violation or threatened violation of failure to obey" the order, regardless of the order's actual content. *See* 12 § 1818(d). We believe that Spiegel's reading of the statute is too rigid. We decline to interpret the statutory language as precluding any judicial review of the agency action at enforcement proceedings.

days later when the government is entitled to an enforcement order unless the temporary order in the meantime has been set aside, limited, or suspended by a court. 12 U.S.C. § (c)(1); (c)(2); (d). The fact that the temporary order is "effective" immediately upon issuance triggers the respondent's obligations and the statutory time limits for judicial review. Before the order becomes "enforceable" at the end of the ten-day period, the respondent has the opportunity to go in for a full judicial review of the appropriateness of the order. If the respondent fails to do this, then the court must enforce the temporary order at the government's request, without substantive judicial review. This does not deprive a respondent such as Spiegel of due process, because he has the opportunity during the ten-day window to go into court to set aside, limit, or suspend enforcement or effectiveness of the temporary order, and to full judicial review in the course of that proceeding.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS SPIEGEL,
Plaintiff,

v.

TIMOTHY RYAN, and UNITED STATES DEPARTMENT OF TREASURY, OFFICE OF THRIFT SUPERVISION,
Defendants.

CASE NO. CV 90-3520 SVW

OFFICE OF THRIFT SUPERVISION,
Plaintiff,

v.

THOMAS SPIEGEL,
Defendant.

CASE NO. CV 90-3720 SVW

ORDER RE INJUNCTION

INTRODUCTION

This matter came before the court on Thomas Spiegel's motion to enjoin enforcement of the Temporary Cease and Desist Order issued by the Office of Thrift Supervision pursuant to its Order #90-1346 (the "Temporary Order") in case number 90-3520, and on the Office of Thrift Supervision's parallel motion to enforce the Temporary Order in case number 90-3720. As these actions involve common questions of law and fact, the court hereby orders these cases consolidated pursuant to Federal Rule of Civil Procedure 42(a). Further, pursuant to Federal Rule of Civil Procedure 65(a)(2), the court orders that the trial on the merits in these actions be, and hereby is,

consolidated with the hearing on the motions for preliminary injunction.

FACTS

Thomas Spiegel ("Spiegel") is the former Chief Executive Officer and Chairman of Columbia Savings & Loan Association ("Columbia"). Columbia is a state chartered, publicly held savings association with its principal place of business in Beverly Hills, California. On November 28, 1989, the Office of Thrift Supervision ("OTS") commenced a formal investigation into the financial affairs of Columbia and Spiegel to determine whether there had been violations of financial laws, rules, or regulations, and whether Columbia or Spiegel had engaged in unsafe and unsound banking practices. As part of this investigation, on June 25, 1990, Spiegel appeared before OTS attorneys pursuant to a subpoena. On that same day, counsel for Spiegel met with the Senior Enforcement Attorney for OTS in order to discuss the status of the investigation. At that time, counsel requested an opportunity to present their position to OTS prior to OTS making any final decision. OTS did not respond to that request.

On July 5, 1990, Timothy Ryan, Director of OTS, issued Order #90-1346. That order found that there was "reasonable cause to believe that Spiegel has engaged in unsafe and unsound practices" and that those practices, or the continuation thereof, "are likely to cause insolvency or significant dissipation of the assets or earnings of Columbia, or are likely to weaken the condition of Columbia, or otherwise prejudice the interests of Columbia's depositors prior to the completion of the proceedings conducted pursuant to . . . 12 U.S.C. § 1818(b)(1)." On the basis of these findings, Director Ryan approved and issued a "Notice of Charges and Hearing and Notice

of Intention to Remove and Prohibit, and to Direct Restitution, and Notice of Assessment of Money Penalty" (the "Notice of Charges") pursuant to 12 U.S.C. § 1818(b)(1), ("(b)(1)"),[1] and the Temporary Order pur-

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[1]12 U.S.C. § 1818(b) is entitled "Cease-and-desist proceedings" and states as follows: "(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or an institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after service of such notice unless an earlier or later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and

suant to 12 U.S.C. § 1818(c)(1), ("(c)(1)").[2] The Notice of Charges set September 4, 1990 as the date for the commencement of the administrative hearing. The Temporary Order required Spiegel, *inter alia*, to deposit all of his Columbia stock into an escrow account and to make restitution to Columbia in the amount of $18,983,000 by no later than 12:00 p.m. on July 6, 1990, the following day.

On July 6, 1990, Spiegel filed the complaint in this case seeking preliminary and permanent injunctive relief pur-

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desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice."

[2]12 U.S.C. § 1818(c) is entitled "Temporary cease-and-desist orders" and states as follows: "(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6)(B) of this section. Such order shall become effective upon service upon the depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order."

suant to 12 U.S.C. § 1818(c)(2), ("(c)(2)").[3] Spiegel also applied, ex parte, for a temporary restraining order. He argued that in issuing the Temporary Order, OTS exceeded its authority under subsection (c)(1), and thus enforcement of the Temporary Order should be enjoined. A hearing on the application for a temporary restraining order was held on July 6, 1990. The court found that the case raised serious questions and that the balance of hardships tipped sharply in Spiegel's favor. Accordingly, the court issued a conditional temporary restraining order and set a hearing on the Spiegel's motion for preliminary injunction for July 30, 1990. On July 17, 1990, OTS filed its complaint against Spiegel seeking to enforce the Temporary Order pursuant to 12 U.S.C. § 1818(d).[4] On

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[3]12 U.S.C. § 1818(c)(2) states that "[w]ithin ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injuction [sic] setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction."

[4]12 U.S.C. § 1818(d) provides that "[i]n the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction."

July 30 and 31, 1990 the court conducted an extended hearing in these matters.

DISCUSSION

The fundamental issue presented by this case is whether the Temporary Order exceeds OTS's statutory authority. *See Mid-America Bancorporation v. Board of Governors*, 523 F.Supp. 568, 577 (D.Minn. 1980) (first step in analyzing a motion under subsection (c)(2) is to determine "whether the temporary order falls within the statutory authority of subsection (c)(1)"). Spiegel contends that the Temporary Order is beyond the scope of (c)(1) because it orders Spiegel to take affirmative action to *correct* the effects of past, allegedly unsafe and unsound, practices. Spiegel asserts that subsection (c)(1) only allows for affirmative action to *prevent* ongoing or future practices. OTS argues that Spiegel's strict dichotomy between the words "correct" and "prevent" was not shared by Congress and that the two words are used interchangeably in the statute. Thus, the key question is whether prevent means prevent or prevent means correct.

When resolving a question of statutory interpretation, courts must give effect to the plain meaning of the language used. *Largo v. Sunn*, 835 F.2d 205, 207 (9th Cir. 1987) (citation omitted). The court must examine the language of the statute in isolation as well as in context. *Id.* There can be no doubt that the words "correct" and "prevent" are different and have distinct meanings. "Correct" means to right that which is already wrong, while "prevent" implies an advance move which blocks the occurrence of something. Further, Congress adopted the clauses in question together in section 202 of the Federal Deposit Insurance Act. Financial Institutions Supervisory Act, Pub. L. 89-695, 1966 *U.S. Code Cong. & Admin.*

News (80 Stat.) 1204, 1225-26. The court must presume that by choosing to use two separate words, Congress intended to distinguish orders requiring "affirmative action to correct" conditions and orders requiring "affirmative action to prevent" conditions. If this was not the intent of the legislators, they would simply have repeated "correct" in subsection (c)(1). A contrary conclusion would simply defy common sense, and is thus impermissible. *See Pacific Mutual Life Insurance Co. v. American Guaranty Life Insurance Co.,* 722 F.2d 1498, 1500 (9th Cir. 1984) (interpretive constructions of a statute which defy common sense are to be avoided). Thus, the court concludes that the word "prevent" as used in subsection (c)(1) does not mean the same thing as the word "correct" which is used in subsection (b)(1).

An examination of subsection (c)(1) in light of the overall legislative scheme supports the foregoing conclusion. Under (b)(1), if OTS believes that a depository-affiliated party has engaged in unsafe and unsound practice in conducting the business of the depository, OTS may issue a notice of charges with respect to that practice. That notice must "fix a time and place at which a hearing will be held to determine whether an order to cease and desist" should issue. Once that hearing is concluded, if OTS finds that the unsafe and unsound practice alleged in the notice of charges is established, OTS may then issue a cease and desist order. That order may require the party to "cease and desist" from engaging in the unsafe and unsound practice and to "take affirmative action to *correct* the conditions resulting from" that practice. 18 U.S.C. § 1818(b)(1) (emphasis added).

Subsection (c)(1) is clearly intended as a provisional remedy pending the proceedings authorized in (b)(1). In

order for OTS to invoke (c)(1), it must first find that the practice specified in the (b)(1) notice of charges is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors "prior to the completion of the proceedings conducted pursuant to [(b)(1)]." 12 U.S.C. § 1818(c)(1). If OTS makes that determination, it may then issue a temporary order requiring the party charged with engaging in unsafe and unsound practices to "cease and desist" from any such practice and to "take affirmative action to *prevent* such insolvency, dissipation, condition or prejudice" pending completion of the (b)(1) hearing. *Id.*

The court must read subsection (c)(1) in the context of subsection (b)(1) and in light of the general legislative scheme. *See Yamaguchi v. State Farm,* 706 F.2d 940, 948 n.11 (9th Cir. 1983) ("One provision of a comprehensive statute should be read in the context of the other provisions of that statute and in light of the general legislative scheme."). From this standpoint, there can be no doubt that in authorizing temporary cease and desist orders, Congress simply intended to protect the depository institution by maintaining the status quo pending completion of the administrative proceedings provided for in (b)(1). Such an order is proper to ensure that no further damage is caused to the institution during the pendency of the (b)(1) proceedings. This reading of subsection (c)(1) comports with the generally accepted understanding of the nature of temporary relief. "It is hornbook law that the general purpose of a preliminary injunction is to preserve the status quo pending final determination of the action after a full hearing." *Lopez v. Heckler,* 725 F.2d 1489, 1509 (9th Cir. 1984) (citation omitted). This is precisely what Congress has done with subsections

(b)(1) and (c)(1). Subsection (c)(1) simply permits OTS to maintain the status quo pending the administrative hearing prescribed in subsection (b)(1). *See, e.g., Mid America Bancorporation,* 523 F.Supp. 568 (federal banking agency issued subsection (c)(1) cease and desist order blocking liquidation of bank holding company pending the outcome of (b)(1) proceedings). Accordingly, the court is convinced that when Congress adopted subsection (c)(1), it authorized OTS to order affirmative action only in those situations where such affirmative action was necessary to prevent ongoing or future injury; consequently, OTS is not authorized to order affirmative action under subsection (c)(1), and thus alter the status quo, by correcting the conditions resulting from past unsafe and unsound practices.

Throughout these proceedings, OTS has taken the position that it has the authority to issue a temporary cease and desist order which requires Spiegel to make restitution to Columbia. In support of this position OTS relies primarily upon 12 U.S.C. § 1818(b)(6), ("(b)(6)").[5]

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[5]12 U.S.C. § 1818(b)(6) is entitled "Affirmative action to correct conditions resulting from violations or practices" and states as follows: "The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to —

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if —

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

OTS contends that subsection (b)(6) supports its interpretation of (c)(1) for two reasons. First, (b)(6) suggests that subsection (c)(1) permits affirmative action to correct harmful conditions, and second, paragraph (A) of subsection (b)(6) explicitly authorizes restitution as an appropriate remedy. Specifically, OTS argues that the clause in (b)(6) which says that "[t]he authority to issue an order under . . . subsection (c) of this section which requires . . . any institution-affiliated party to take affirmative action to correct any conditions" implies that subsection (c)(1) authorizes affirmative corrective orders. OTS concludes that if (c)(1) does authorize affirmative corrective orders, "prevent" must mean "correct." Further, OTS argues that its order is expressly authorized by paragraph (A) of (b)(6) since that paragraph explicitly provides for restitution. The court initially gave great weight to this view; however, upon further research and reflection, this position must be rejected.

In essence, subsection (b)(6) states as follows: to the extent that subsections (b) and (c) authorize orders requiring affirmative action to correct conditions resulting from the alleged violation or practice, those orders may require the party so ordered to do the things enumerated in § 1818(b)(6)(A)-(F). Subsection (b)(6) thus suggests that subsection (c) authorizes the issuance of cease and desist orders which require affirmative action to correct harmful conditions. However, it does not follow that the authority to issue corrective temporary orders is

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(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and,

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and,

(F) take such other action as the banking agency determines to be appropriate.

to be found in paragraph (1) of subsection (c).[6] Thus the next question is where in subsection (c) the affirmative corrective temporary orders are authorized.

The answer to this is paragraph (3)(A)(ii) of subsection (c).[7] Under § 1818(c)(3)(A)(ii), OTS is authorized — upon the requisite showing — to issue a temporary order requiring affirmative action to restore a depository institutions books and records. This is clearly an affirmative corrective temporary order. "Restore" contemplates the making right of that which is wrong, it does not imply the preventing of some future harm. Thus, when subsection (b)(6) suggests that subsection (c) authorizes affirmative corrective temporary orders, it is referring to subsection (c)(3)(A)(ii) and not subsection (c)(1).

This construction explains the statement in paragraph (c)(1) that an order under (c)(1) "may include any

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[6]Indeed, the language relied on by OTS refers to "subsection (c)" and not "paragraph (1) of subsection (c)." This is significant because, in drafting the Financial Institutions Recovery Act, Congress explicitly referred to specific paragraphs when it meant to focus on those paragraphs. *See, e.g.*, 12 U.S.C. § 1818(c)(1) ("pursuant to paragraph (1) of subsection (b)").

[7]12 U.S.C. § 1818(c)(3)(A)(ii) states as follows: "If a notice of charges served under subsection (b)(1) of this section specifies, on the basis of particular facts and circumstances, that an insured depository institution's books and records are so incomplete or inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution, the agency may issue a temporary order requiring — ... (ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1) of this section."

requirement authorized under subsection (b)(6)(B) of this section." 12 U.S.C. § 1818(c)(1). All of the remedies enumerated in subsection (b)(6) are authorized in affirmative corrective orders under subsection(b) and subsection (c)(3)(A)(ii). However, those remedies are not allowed under subsection (c)(1), since that subsection does not authorize affirmative corrective orders, but only affirmative preventive orders. Congress recognized this, and at the same time wanted to authorize OTS to issue orders which require that the growth of the institution in question be restricted. Accordingly, it authorized this remedy by expressly referring to subsection (b)(6)(B) in subsection (c)(1). Thus, the statement in (c)(1) says that "restricting the growth of the depository institution is a valid preventive remedy under this subsection."

The foregoing reading of the statute is fully supported by the legislative history. Subsections (b)(6) and (c)(3), along with the phrase in (c)(1) discussed in the preceding paragraph, were all adopted together in section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). FIRREA, Pub. L. No. 101-73, 1989 *U.S. Code Cong. & Admin. News* (103 Stat.) 183, 440. The House Conference Report states, in relevant part, as follows:

> Section 902 clarifies the authority of the agencies to order restitution or reimbursement in a cease and desist order (C&D). It specifies that a C&D order may include restrictions of specific activities of a financial institution or its employees. It also provides that an agency can issue temporary *corrective* C&D orders *whenever an institution's records are so incomplete or inaccurate that the regulatory agency is not able to determine the institution's financial condition.* It contains a provision allowing the regulators to issue a

> temporary C&D that may restrict growth in an institution.

House Conf. Rep. No. 101-222, 101st Cong., 1st Sess. 439, *reprinted in* 1989 *U.S. Code Cong. & Admin. News,* 432, 478 (emphasis added). The first sentence refers to subsection (b)(6)(A) and the second to subsection (b)(7). Then the committee alludes to subsection (c)(3) and notes that temporary *corrective* orders are authorized thereby. Thus, the committee expressly contemplated corrective temporary orders under paragraph (3) of subsection (c). Finally, the last sentence quoted above clearly states that the remedy found at subsection (b)(6)(B) is a permissible *temporary* order. If Congress intended to authorize all of the remedies found at (b)(6) as temporary remedies available under subsection (c)(1), then it could and would have done so in a much more straightforward manner.

The foregoing construction is rooted in the plain meaning of the language of the statute and is in accord with the legislative intent. Further, this reading is not internally contradictory, nor does it render any related provisions inconsistent or meaningless. Finally, this construction is logical and does not defy common sense nor lead to an absurdity.

OTS takes issue with the foregoing construction. OTS argues that, in accordance with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 S.Ct. 837 (1984), the court should defer to OTS's construction of the statute. In *Chevron* the United States Supreme Court held as follows:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether

> Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted). It is not appropriate to defer to OTS's construction of subsection (c)(1) for two reasons. First, *Chevron* is limited to situations where Congress has not addressed the issue in question. The foregoing analysis demonstrates that Congress has spoken directly on the scope of OTS's authority under (c)(1). The statute is a bit complex and requires some examination, but it is not silent or ambiguous. Thus, the *Chevron* doctrine simply does not apply.

Even if the court were to find that (c)(1) is ambiguous, deference to OTS's construction of the statute would nonetheless be inappropriate as that construction leads to an unconstitutional result and is thus impermissible.[8] OTS's Temporary Order requires Spiegel to surrender millions of dollars in cash and stock. There can be no dispute that these assets constitute a significant property right protected by the Due Process Clause of the United

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[8]The court recognizes that as a general rule, prudential concerns caution against needlessly confronting constitutional issues. However, the discussion that follows is offered to demonstrate that the construction offered by OTS is impermissible.

States Constitution. Thus the government cannot deprive Spiegel of these assets without due process of law. U.S. Const. amend. V. Due process generally requires that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest. *Zinermon v. Burch,* 110 S.Ct. 975, 984 (1990). However, "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Insurance Corp. v. Mallen,* 486 U.S. 230, 240 (1988) (citations omitted).[9]

Mallen suggests that the court should consider three factors in determining whether the government may postpone a hearing until after the property deprivation: (1) whether the case demands prompt action; (2) whether there is an important government interest involved; and, (3) whether there is "substantial assurance that the *deprivation* is not baseless or unwarranted." *Id.* (emphasis added). Applying this analysis to the case at bar demonstrates that OTS's construction of (c)(1) would violate due process. Close scrutiny of *Mallen* indicates that a court's analysis of these factors is somewhat circumscribed. With regard to the need for prompt action, the *Mallen* Court deferred to "the *Congressional* finding" that prompt suspension of indicted bank officers was

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[9] *Mallen* involved a bank officer who was suspended pursuant 12 U.S.C. § 1818(g) after he was indicted by a federal grand-jury which charged him with making false statements in violation of § 18 U.S.C. § 1001 and § 1014. 12 U.S.C. § 1818(g)(1) provides that when an institution affiliated party is charged in an indictment with the commission of a felony involving dishonesty or breach of trust, the appropriate agency may, if the requisite finding is made, suspend that party from participating in the affairs of the depository institution.

necessary. *Id.* at 241 (emphasis added). The Court did not engage in an independent analysis to determine whether prompt action was necessary in the particular case; instead, the Court was satisfied that Congress had made such a determination on a macro level. If this court applies the same approach, there can be but one conclusion: (c)(1) is premised on a Congressional finding that it is necessary, under appropriate circumstances, to promptly issue interim cease and desist orders to depository institutions and affiliated parties. The analysis of this factor must begin and end here.

The Supreme Court approached the government interest factor in a similar manner. Here, the Court simply acknowledged the interest of bank depositors and the interest of maintaining public confidence in the nation's banking institutions. It again relied on a Congressional statement and noted only that the interests in question were "certainly as significant as the State's interest in preserving the integrity of the sport of horse racing, an interest that we deemed sufficient in *Barry v. Barchi.*" *Id.*[10] While the *Mallen* court looked to Congress to determine the government interest at stake, the case suggests that some judicial weighing may be appropriate. Still, any discretion exercised by a court must be done on a broad level, for the Supreme Court did not weigh the government's interest vis-a-vis Mr. Mallen or Mr. Barchi, but considered that interest as it applies across the board. If this court does the same, we can discern no distinction between the government's interest underlying the statute in *Mallen* and the government's interest underlying § 1818(c): both cases implicate the interests of individual

[10] In *Barchi*, the Supreme Court stated that the state has "an important interest in assuring the integrity of the racing carried on under its auspices." *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

depositors in having their money cared for and the interest of society in maintaining the integrity of U.S. financial institutions. Accordingly, like the need for prompt action factor, the government interest factor of *Mallen* would be satisfied under OTS's construction of (c)(1).

The final factor to consider is whether there is a substantial assurance that the deprivation is not baseless or unwarranted. At the hearing in this case, OTS argued that the court should treat this factor like it does the other two, it should defer to Congress. Thus, if the terms of the statute are satisfied, OTS argued, there is *ipso facto* a substantial assurance that the deprivation is warranted, and the court should not look any further.

Ostensibly, there is support for this position in *Mallen* and the cases *Mallen* relies on. In each of those cases, the Supreme Court did not expressly consider whether the deprivation itself was warranted, it simply looked to see if there was substantial assurance that the terms of the statute in question were satisfied. For example, in *Mallen* and *Barchi* the Court ceased its analysis once it was substantially assured that the condition of the underlying statute were satisfied. The Court did not explicitly examine whether the deprivation, i.e., the suspension of Mr. Mallen and Mr. Barchi, was warranted. *See Mallen*, 486 U.S. at 241 (indictment satisfied court that § 1818(g)(1) was satisfied); *Barchi*, 443 U.S. at 65 (state official's determination that Barchi's horse was drugged substantially assured Court that statute was satisfied). Likewise, the Court in *Dixon v. Love*, 431 U.S. 105 (1977), did not look to see whether the suspension of Mr. Love's driver's licence was warranted; it simply looked to see whether the statutory prerequisites for that suspension were met. Finally, in *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), the Court did not look at

whether the seizure of the food was warranted, but whether the statutory preconditions to such a seizure were satisfied. However, insofar as these cases are concerned, it is not truly possible to separate an analysis of the statute from an analysis of the deprivation.

In each of the foregoing cases, a substantial assurance that the statute was satisfied was equivalent to a substantial assurance that the deprivation was warranted. The two inquiries were one and the same. Since the deprivation was automatic upon a finding that the statutory requirements were met, the Court was in fact examining the deprivation, even though it discussed the issue in terms of the statute which provided for that deprivation.[11]

Accordingly, this court must accept at face value the standard set out in *Mallen*: the court must be substantially assured that the *deprivation* was warranted and not simply that the statute was satisfied. A contrary reading of *Mallen* would allow Congress to establish the parameters of due process without any provision for judicial review. Such a delegation of authority violates the well-established principle of the separation of powers. *See Marbury v. Madison*, 1 Cranch 137 (U.S. 1803).

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[11]The same is true of *Fahey v. Mallonee*, 332 U.S. 245 (1947), and the more recent cases involving the appointment of conservators upon which OTS so heavily relies. In each of those cases, the deprivation (i.e. the government's taking of the financial institution) was virtually automatic once the statute was satisfied. Thus, in *Fahey*, the Court's analysis proceeded as follows: First, the Court determined that the statute which provided for the deprivation was constitutional. *Id.* at 250-54. Next, it found that the charges in question were within the purview of the statute. *Id.* at 254. At that point, the analysis was concluded, for there was no need to make an explicit finding that the deprivation was warranted. That conclusion follows automatically.

It follows that the court would have to make an independent determination of whether there is a substantial assurance that the deprivation contemplated in OTS's Temporary Order is warranted. Under the facts of this case, this court would have to conclude that there is no assurance that the deprivation in question is warranted. Accordingly, even if the Temporary Order was authorized by the statute, it would be unconstitutional. Therefore, a construction of the statute, which would allow for such an order, is clearly impermissible.

CONCLUSION

The Temporary Order requires Spiegel to make restitution to Columbia in order to correct conditions resulting from past, allegedly unsafe and unsound, banking practices. Such affirmative corrective action is not authorized by 12 U.S.C. § 1818(c)(1). Thus, OTS's motion to enforce the Temporary Order must be denied and Spiegel's motion to enjoin enforcement of the Temporary Order must be granted. Accordingly, the Office of Thrift Supervision is hereby permanently enjoined from enforcing the Temporary Order to Cease and Desist issued pursuant to OTS Order # 90-1346.

IT IS SO ORDERED.

DATED: August 3, 1990

STEPHEN V. WILSON
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS SPIEGEL,
Plaintiff,

v.

TIMOTHY RYAN, and UNITED STATES DEPARTMENT OF TREASURY, OFFICE OF THRIFT SUPERVISION,
Defendants.

CASE NO. CV 90-3520 SVW

OFFICE OF THRIFT SUPERVISION,
Plaintiff,

v.

THOMAS SPIEGEL,
Defendant.

CASE NO. CV 90-3720 SVW

AMENDED[1] ORDER RE PRELIMINARY INJUNCTION

INTRODUCTION

This matter came before the court on Thomas Spiegel's motion to enjoin enforcement of the Temporary Cease and Desist Order issued by the Office of Thrift Supervision pursuant to its Order #90-1346 (the "Temporary Order") in case number 90-3520, and on the Office of Thrift

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[1]This order supercedes this court's previous Order Re Injunction, entered August 6, 1990. This amended order does not affect the court's reasoning or decision as reflected in its previous order. Rather, the court seeks, for the sake of accuracy, to correct certain technical errors that were discovered subsequent to the court's entry of the prior order.

Supervision's parallel motion to enforce the Temporary Order in case number 90-3720. As these actions involve common questions of law and fact, the court hereby orders these cases consolidated pursuant to Federal Rule of Civil Procedure 42(a). Further, pursuant to Federal Rule of Civil Procedure 65(a)(2), the court orders that the trial on the merits in these actions be, and hereby is, consolidated with the hearing on the motions for preliminary injunction.

FACTS

Thomas Spiegel ("Spiegel") is the former Chief Executive Officer and Chairman of Columbia Savings & Loan Association ("Columbia"). Columbia is a state chartered, publicly held savings association with its principal place of business in Beverly Hills, California. On November 28, 1989, the Office of Thrift Supervision ("OTS") commenced a formal investigation into the financial affairs of Columbia and Spiegel to determine whether there had been violations of financial laws, rules, or regulations, and whether Columbia or Spiegel had engaged in unsafe and unsound banking practices. As part of this investigation, on June 25, 1990, Spiegel appeared before OTS attorneys pursuant to a subpoena. On that same day, counsel for Spiegel met with the Senior Enforcement Attorney for OTS in order to discuss the status of the investigation. At that time, counsel requested an opportunity to present their position to OTS prior to OTS making any final decision. OTS did not respond to that request.

On July 5, 1990, Timothy Ryan, Director of OTS, issued Order #90-1346. That order found that there was "reasonable cause to believe that Spiegel has engaged in unsafe and unsound practices" and that those practices, or the continuation thereof, "are likely to cause insol-

vency or significant dissipation of the assets or earnings of Columbia, or are likely to weaken the condition of Columbia, or otherwise prejudice the interests of Columbia's depositors prior to the completion of the proceedings conducted pursuant to . . . 12 U.S.C. § 1818(b)(1)." On the basis of these findings, Director Ryan approved and issued a "Notice of Charges and Hearing and Notice of Intention to Remove and Prohibit, and to Direct Restitution, and Notice of Assessment of Money Penalty" (the "Notice of Charges") pursuant to 12 U.S.C § 1818(b)(1), ("(b)(1)"),[2] and the Temporary Order

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[2] 12 U.S.C. § 1818(b) is entitled "Cease-and-desist proceedings" and states as follows: "(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after service of such notice unless an earlier or later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if

pursuant to 12 U.S.C § 1818 (c)(1), ("(c)(1)").[3] The Notice of Charges set September 4, 1990 as the date for the commencement of the administrative hearing. The Temporary Order required Spiegel, *inter alia*, to deposit

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upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice."

[3] 12 U.S.C. § 1818(c) is entitled "Temporary cease-and-desist orders" and states as follows: "(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6)(B) of this section. Such order shall become effective upon service upon the depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order."

all of his Columbia stock into an escrow account and to make restitution to Columbia in the amount of $18,983,000, by no later than 12:00 p.m. on July 6, 1990, the following day.

On July 6, 1990, Spiegel filed the complaint in this case seeking preliminary and permanent injunctive relief pursuant to 12 U.S.C. § 1818(c)(2), ("(c)(2)").[4] Spiegel also applied, ex parte, for a temporary restraining order. He argued that in issuing the Temporary Order, OTS exceeded its authority under subsection (c)(1), and thus enforcement of the Temporary Order should be enjoined. A hearing on the application for a temporary restraining order was held on July 6, 1990. The court found that the case raised serious questions and that the balance of hardships tipped sharply in Spiegel's favor. Accordingly, the court issued a conditional temporary restraining order and set a hearing on the Spiegel's motion for preliminary injunction for July 30, 1990. On July 17, 1990, OTS filed its complaint against Spiegel seeking to enforce the Temporary Order pursuant to 12 U.S.C. § 1818(d).[5] On

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[4] 12 U.S.C. § 1818(c)(2) states that "[w]ithin ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injuction [sic] setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction."

[5] 12 U.S.C. §1818(d) provides that "[i]n the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of

July 30 and 31, 1990 the court conducted an extended hearing in these matters.

DISCUSSION

The fundamental issue presented by this case is whether the Temporary Order exceeds OTS's statutory authority. *See Mid America Bancorporation v. Board of Governors*, 523 F.Supp. 568, 577 (D.Minn. 1980) (first step in analyzing a motion under subsection (c)(2) is to determine "whether the temporary order falls within the statutory authority of subsection (c)(1)"). Spiegel contends that the Temporary Order is beyond the scope of (c)(1) because it orders Spiegel to take affirmative action to *correct* the effects of past, allegedly unsafe and unsound practices. Spiegel asserts that subsection (c)(1) only allows for affirmative action to *prevent* ongoing or future practices. OTS argues that Spiegel's strict dichotomy between the words "correct" and "prevent" was not shared by Congress and that the two words are used interchangeably in the statute. Thus, the key question is whether prevent means prevent or prevent means correct.

When resolving a question of statutory interpretation, courts must give effect to the plain meaning of the language used. *Largo v. Sunn*, 835 F.2d 205, 207 (9th Cir. 1987) (citation omitted). The court must examine the language of the statute in isolation as well as in context. *Id.* There can be no doubt that the words "correct" and

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this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction."

"prevent" are different and have distinct meanings. "Correct" means to right that which is already wrong, while "prevent" implies an advance move which blocks the occurrence of something. Congress adopted the remedial clauses at issue together in section 202 of the Financial Institutions Supervisory Act of 1966. Pub. L. No. 89-695, 1966 *U.S. Code Cong. & Admin. News* (80 Stat.) 1204, 1225-26 (amending, in pertinent part, section 8 of the Federal Deposit Insurance Act as codified at 12 U.S.C. § 1818(b)(1), (c)(1)). While the language in subsection (c)(1) allowing a cease and desist order to require a party "to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice" was not added until 1978, (Pub. L. No. 95-630, 1978 *U.S. Code Cong. & Admin. News* (92 Stat.) 3641, 3654 (amending, in pertinent part, 12 U.S.C. § 1818(c)(1)),) Congress added that language in the presence of the preexisting language in subsection (b)(1). The court must presume that by choosing to use two separate words, Congress intended to distinguish orders requiring "affirmative acton to correct" conditions and orders requiring "affirmative action to prevent" conditions. If this was not the intent of the legislators, they would simply have repeated "correct" in subsection (c)(1). A contrary conclusion would simply defy common sense, and is thus impermissible. *See Pacific Mutual Life Insurance Co. v. American Guaranty Life Insurance Co.*, 722 F.2d 1498, 1500 (9th Cir. 1984) (interpretive constructions of a statute which defy common sense are to be avoided). Thus, the court concludes that the word "prevent" as used in subsection (c)(1) does not mean the same thing as the word "correct" which is used in subsection (b)(1).

An examination of subsection (c)(1) in light of the overall legislative scheme supports the foregoing conclusion. Under (b)(1), if OTS believes that a depository-

affiliated party has engaged in unsafe and unsound practice in conducting the business of the depository, OTS may issue a notice of charges with respect to that practice. That notice must "fix a time and place at which a hearing will be held to determine whether an order to cease and desist" should issue. Once that hearing is concluded, if OTS finds that the unsafe and unsound practice alleged in the notice of charges is established, OTS may then issue a cease and desist order. That order may require the party to "cease and desist" from engaging in the unsafe and unsound practice and to "take affirmative action to *correct* the conditions resulting from" that practice. 12 U.S.C. § 1818(b)(1) (emphasis added).

Subsection (c)(1) is clearly intended as a provisional remedy pending the proceedings authorized in (b)(1). In order for OTS to invoke (c)(1), it must first find that the practice specified in the (b)(1) notice of charges is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interest of its depositors "prior to the completion of the proceedings conducted pursuant to [(b)(1)]." 12 U.S.C. § 1818(c)(1). If OTS makes that determination, it may then issue a temporary order requiring the party charged with engaging in unsafe and unsound practices to "cease and desist" from any such practice and to "take affirmative action to *prevent* such insolvency, dissipation, condition or prejudice" pending completion of the (b)(1) hearing. *Id.*

The court must read subsection (c)(1) in the context of subsection (b)(1) and in light of the general legislative scheme. *See Yamaguchi v. State Farm*, 706 F.2d 940, 948 n.11 (9th Cir. 1983) ("One provision of a comprehensive

statute should be read in the context of the other provisions of that statute and in light of the general legislative scheme."). From this standpoint, there can be no doubt that in authorizing temporary cease and desist orders, Congress simply intended to protect the depository institution by maintaining the status quo pending completion of the administrative proceedings provided for in (b)(1). Such an order is proper to ensure that no further damage is caused to the institution during the pendency of the (b)(1) proceedings. This reading of subsection (c)(1) comports with the generally accepted understanding of the nature of temporary relief. "It is hornbook law that the general purpose of a preliminary injunction is to preserve the status quo pending final determination of the action after a full hearing." *Lopez v. Heckler*, 725 F.2d 1489, 1509 (9th Cir. 1984) (citation omitted). This is precisely what Congress has done with subsections (b)(1) and (c)(1). Subsection (c)(1) simply permits OTS to maintain the status quo pending the administrative hearing prescribed in subsection (b)(1). *See, e.g., Mid America Bancorporation*, 523 F.Supp. 568 (federal banking agency issued subsection (c)(1) cease and desist order blocking liquidation of bank holding company pending the outcome of (b)(1) proceedings). Accordingly, the court is convinced that when Congress adopted subsection (c)(1), it authorized OTS to order affirmative action only in those situations where such affirmative action was necessary to prevent ongoing or future injury; consequently, OTS is not authorized to order affirmative action under subsection (c)(1), and thus alter the status quo, by correcting the conditions resulting from past unsafe and unsound practices.

Throughout these proceedings, OTS has taken the position that it has the authority to issue a temporary cease and desist order which requires Spiegel to make restitu-

tion to Columbia. In support of this position OTS relies primarily upon 12 U.S.C. § 1818(b)(6), ("(b)(6)".[6] OTS contends that subsection (b)(6) supports its interpretation of (c)(1) for two reasons. First, (b)(6) suggests that subsection (c)(1) permits affirmative action to correct harmful conditions, and second, paragraph (A) of subsection (b)(6) explicitly authorizes restitution as an appropriate remedy. Specifically, OTS argues that the clause in (b)(6) which says that "[t]he authority to issue an order under . . . subsection (c) of this section which requires . . . any institution-affiliated party to take affirm-

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[6]12 U.S.C. § 1818(b)(6) is entitled "Affirmative action to correct conditions resulting from violations or practices" and states as follows: "The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to —

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if —

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and,

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and,

(F) take such other action as the banking agency determines to be appropriate.

ative action to correct any conditions" implies that subsection (c)(1) authorizes affirmative corrective orders. OTS concludes that if (c)(1) does authorize affirmative corrective orders, "prevent" must mean "correct." Further, OTS argues that its order is expressly authorized by paragraph (A) of (b)(6) since that paragraph explicitly provides for restitution. The court initially gave great weight to this view; however, upon further research and reflection, this position must be rejected.

In essence, subsection (b)(6) states as follows: to the extent that subsections (b) and (c) authorize orders requiring affirmative action to correct conditions resulting from the alleged violation or practice, those orders may require the party so ordered to do the things enumerated in § 1818(b)(6)(A)-(F). Subsection (b)(6) thus suggests that subsection (c) authorizes the issuance of cease and desist orders which require affirmative action to correct harmful conditions. However, it does not follow that the authority to issue corrective temporary orders is to be found in paragraph (1) of subsection (c).[7] Thus the next question is where in subsection (c) the affirmative corrective temporary orders are authorized.

The answer to this is paragraph (3)(A)(ii) of subsection (c).[8] Under § 1818(c)(3)(A)(ii), OTS is authorized

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[7]Indeed, the language relied on by OTS refers to "subsection (c)" and not "paragraph (1) of subsection (c)." This is significant because, in drafting the Financial Institutions Recovery Act, Congress explicitly referred to specific paragraphs when it meant to focus on those paragraphs. *See, e.g.*, 12 U.S.C. § 1818(c)(1) ("pursuant to paragraph (1) of subsection (b)").

[8]12 U.S.C. § 1818(c)(3)(A)(ii) states as follows: "If a notice of charges served under subsection (b)(1) of this section specifies, on the basis of particular facts and circumstances, that an insured depository institution's books and records are so incomplete or

— upon the requisite showing — to issue a temporary order requiring affirmative action to restore a depository institution's books and records. This is clearly an affirmative corrective temporary order. "Restore" contemplates the making right of that which is wrong, it does not imply the preventing of some future harm. Thus, when subsection (b)(6) suggests that subsection (c) authorizes affirmative corrective temporary orders, it is referring to subsection (c)(3)(A)(ii) and not subsection (c)(1).

This construction explains the statement in paragraph (c)(1) that an order under (c)(1) "may include any requirement authorized under subsection (b)(6)(B) of this section." 12 U.S.C. § 1818(c)(1). All of the remedies enumerated in subsection (b)(6) are authorized in affirmative corrective orders under subsection (b) and subsection (c)(3)(A)(ii). However, those remedies are not allowed under subsection (c)(1), since that subsection does not authorize affirmative corrective orders, but only affirmative preventive orders. Congress recognized this, and at the same time wanted to authorize OTS to issue orders which require that the growth of the institution in question be restricted. Accordingly, it authorized this remedy by expressly referring to subsection (b)(6)(B) in subsection (c)(1). Thus, the statement in (c)(1) says that "restricting the growth of the depository institution is a valid preventive remedy under this subsection."

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inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution, the agency may issue a temporary order requiring — . . . (ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1) of this section."

The foregoing reading of the statute is fully supported by the legislative history. Subsections (b)(6) and (c)(3), along with the phrase in (c)(1) discussed in the preceding paragraph, were all adopted together in section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). FIRREA, Pub. L. No. 101-73, 1989 *U.S. Code Cong. & Admin. News* (103 Stat.) 183, 450. The House Conference Report states, in relevant part, as follows:

> Section 902 clarifies the authority of the agencies to order restitution or reimbursement in a cease and desist order (C&D). It specifies that a C&D order may include restrictions of specific activities of a financial institution or its employees. It also provides that an agency can issue temporary *corrective* C&D orders *whenever an institution's records are so incomplete or inaccurate that the regulatory agency is not able to determine the institution's financial condition.* It contains a provision allowing the regulators to issue a temporary C&D that may restrict growth in an institution.

House Conf. Rep. No. 101-222, 101st Cong., 1st Sess. 439, *reprinted in* 1989 *U.S. Code Cong. & Admin. News,* 432, 478 (emphasis added). The first sentence refers to subsection (b)(6)(A) and the second to subsection (b)(7). Then the committee alludes to subsection (c)(3) and notes that temporary *corrective* orders are authorized thereby. Thus, the committee expressly contemplated corrective temporary orders under paragraph (3) of subsection (c). Finally, the last sentence quoted above clearly states that the remedy found at subsection (b)(6)(B) is permissible *temporary* order. If Congress intended to authorize all of the remedies found at (b)(6) as temporary remedies available under subsection (c)(1), then it could and

would have done so in a much more straightforward manner.

The foregoing construction is rooted in the plain meaning of the language of the statute and is in accord with the legislative intent. Further, this reading is not internally contradictory, nor does it render any related provisions inconsistent or meaningless. Finally, this construction is logical and does not defy common sense nor lead to an absurdity.

OTS takes issue with the foregoing construction. OTS argues that, in accordance with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 S.Ct. 837 (1984), the court should defer to OTS's construction of the statute. In *Chevron* the United States Supreme Court held as follows:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted). It is not appropriate to defer to OTS's construction of subsection (c)(1) for two

reasons. First, *Chevron* is limited to situations where Congress has not addressed the issue in question. The foregoing analysis demonstrates that Congress has spoken directly on the scope of OTS's authority under (c)(1). The statute is a bit complex and requires some examination, but it is not silent or ambiguous. Thus, the *Chevron* doctrine simply does not apply.

Even if the court were to find that (c)(1) is ambiguous, deference to OTS's construction of the statute would nonetheless be inappropriate as that construction leads to an unconstitutional result and is thus impermissible.[9] OTS's Temporary Order requires Spiegel to surrender millions of dollars in cash and stock. There can be no dispute that these assets constitute a significant property right protected by the Due Process Clause of the United States Constitution. Thus the government cannot deprive Spiegel of these assets without due process of law. U.S. Const. amend. V. Due process generally requires that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest. *Zinermon v. Burch*, 110 S.Ct. 975, 984 (1990). However, "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240 (1988) (citations omitted).[10]

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[9]The court recognizes that as a general rule, prudential concerns caution against needlessly confronting constitutional issues. However, the discussion that follows is offered to demonstrate that the construction offered by OTS is impermissible.

[10]*Mallen* involved a bank officer who was suspended pursuant to 12 U.S.C. § 1818(g) after he was indicted by a federal grand jury which

Mallen suggests that the court should consider three factors in determining whether the government may postpone a hearing until after the property deprivation: (1) whether the case demands prompt action; (2) whether there is an important government interest involved; and, (3) whether there is "substantial assurance that the *deprivation* is not baseless or unwarranted." *Id.* (emphasis added). Applying this analysis to the case at bar demonstrates that OTS's construction of (c)(1) would violate due process. Close scrutiny of *Mallen* indicates that a court's analysis of these factors is somewhat circumscribed. With regard to the need for prompt action, the *Mallen* Court deferred to "the *Congressional* finding" that prompt suspension of indicted bank officers was necessary. *Id.* at 241 (emphasis added). The Court did not engage in an independent analysis to determine whether prompt action was necessary in the particular case; instead, the Court was satisfied that Congress had made such a determination on a macro level. If this court applies the same approach, there can be but one conclusion: (c)(1) is premised on a Congressional finding that it is necessary, under appropriate circumstances, to promptly issue interim cease and desist orders to depository institutions and affiliated parties. The analysis of this factor must begin and end here.

The Supreme Court approached the government interest factor in a similar manner. Here, the Court simply acknowledged the interest of bank depositors and the interest of maintaining public confidence in the nation's

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charged him with making false statements in violation of 18 U.S.C. § 1001 and § 1014. 12 U.S.C. § 1818(g)(1) provides that when an institution affiliated party is charged in an indictment with the commission of a felony involving dishonesty or breach of trust, the appropriate agency may, if the requisite finding is made, suspend that party from participating in the affairs of the depository institution.

banking institutions. It again relied on a Congressional statement and noted only that the interests in question were "certainly as significant as the State's interest in preserving the integrity of the sport of horse racing, an interest that we deemed sufficient in *Barry v. Barchi.*" *Id.*[11] While the *Mallen* court looked to Congress to determine the government interest at stake, the case suggests that some judicial weighing may be appropriate. Still, any discretion exercised by a court must be done on a broad level, for the Supreme Court did not weigh the government's interest vis-a-vis Mr. Mallen or Mr. Barchi, but considered that interest as it applies across the board. If this court does the same, we can discern no distinction between the government's interest underlying the statute in *Mallen* and the government's interest underlying § 1818(c): both cases implicate the interests of individual depositors in having their money cared for and the interest of society in maintaining the integrity of U.S. financial institutions. Accordingly, like the need for prompt action factor, the government interest factor of *Mallen* would be satisfied under OTS's construction of (c)(1).

The final factor to consider is whether there is a substantial assurance that the deprivation is not baseless or unwarranted. At the hearing in this case, OTS argued that the court should treat this factor like it does the other two, it should defer to Congress. Thus, if the terms of the statute are satisfied, OTS argued, there is *ipso facto* a substantial assurance that the deprivation is warranted, and the court should not look any further.

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[11]In *Barchi*, the Supreme Court stated that the state has "an important interest in assuring the integrity of the racing carried on under its auspices." *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

Ostensibly, there is support for this position in *Mallen* and the cases *Mallen* relies on. In each of those cases, the Supreme Court did not expressly consider whether the deprivation itself was warranted, it simply looked to see if there was substantial assurance that the terms of the statute in question were satisfied. For example, in *Mallen* and *Barchi* the Court ceased its analysis once it was substantially assured that the condition of the underlying statute were satisfied. The Court did not explicitly examine whether the deprivation, i.e., the suspension of Mr. Mallen and Mr. Barchi, was warranted. *See Mallen*, 486 U.S. at 241 (indictment satisfied court that § 1818(g)(1) was satisfied); *Barchi*, 443 U.S. at 65 (state official's determination that Barchi's horse was drugged substantially assured Court that statute was satisfied). Likewise, the Court in *Dixon v. Love*, 431 U.S. 105 (1977), did not look to see whether the suspension of Mr. Love's driver's licence was warranted; it simply looked to see whether the statutory prerequisites for that suspension were met. Finally, in *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), the Court did not look at whether the seizure of the food was warranted, but whether the statutory preconditions to such a seizure were satisfied. However, insofar as these cases are concerned, it is not truly possible to separate an analysis of the statute from an analysis of the deprivation.

In each of the foregoing cases, a substantial assurance that the statute was satisfied was equivalent to a substantial assurance that the deprivation was warranted. The two inquiries were one and the same. Since the deprivation was automatic upon a finding that the statutory requirements were met, the Court was in fact examining

the deprivation, even though it discussed the issue in terms of the statute which provided for that deprivation.[12]

Accordingly, this court must accept at face value the standard set out in *Mallen:* the court must be substantially assured that the *deprivation* was warranted and not simply that the statute was satisfied. A contrary reading of *Mallen* would allow Congress to establish the parameters of due process without any provision for judicial review. Such a delegation of authority violates the well-established principle of the separation of powers. *See Marbury v. Madison*, 1 Cranch 137 (U.S. 1803).

It follows that the court would have to make an independent determination of whether there is a substantial assurance that the deprivation contemplated in OTS's Temporary Order is warranted. Under the facts of this case, this court would have to conclude that there is no assurance that the deprivation in question is warranted. Accordingly, even if the Temporary Order was authorized by the statute, it would be unconstitutional. Therefore, a construction of the statute, which would allow for such an order, is clearly impermissible.

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[12]The same is true of *Fahey v. Mallonee*, 332 U.S. 245 (1947), and the more recent cases involving the appointment of conservators upon which OTS so heavily relies. In each of those cases, the deprivation (i.e., the government's taking of the financial institution) was virtually automatic once the statute was satisfied. Thus, in *Fahey*, the Court's analysis proceeded as follows: First, the Court determined that the statute which provided for the deprivation was constitutional. *Id.* at 250-54. Next, it found that the charges in question were within the purview of the statute. *Id.* at 254. At that point, the analysis was concluded, for there was no need to make an explicit finding that the deprivation was warranted. That conclusion follows automatically.

CONCLUSION

The Temporary Order requires Spiegle to make restitution to Columbia in order to correct conditions resulting from past, allegedly unsafe and unsound, banking practices. Such affirmative corrective action is not authorized by 12 U.S.C. § 1818(c)(1). Thus, OTS's motion to enforce the Temporary Order must be denied and Spiegel's motion to enjoin enforcement of the Temporary Order must be granted. Accordingly, the Office of Thrift Supervision is hereby permanently enjoined from enforcing the Temporary Order to Cease and Desist issued pursuant to OTS Order #90-1346.

IT IS SO ORDERED.

DATED: October 4, 1990

STEPHEN V. WILSON
United States District Judge

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

In the Matter of

THOMAS SPIEGEL

Former Director and Chief Executive Officer

COLUMBIA SAVINGS AND LOAN ASSOCIATION

Beverly Hills, California

Re: Order No. 90-1346

Dated: July 5, 1990

TEMPORARY ORDER TO CEASE AND DESIST

On July 5, 1990, the Office of Thrift Supervision ("OTS") issued a Notice of Charges and Hearing and Notice of Intention to Remove and Prohibit, to Direct Restitution, and Notice to Assess Civil Money Penalty ("Notice") against Thomas Spiegel ("Spiegel"), former Director and Chief Executive Officer and presently a major shareholder of Columbia Savings and Loan Association, Beverly Hills, California ("Columbia"), pursuant to the authority of Section 5(d)(1)(A) of the Home Owners' Loan Act of 1933 ("HOLA") *as amended* by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA") (to be codified at 12 U.S.C. § 1464(d)(1)(A)), and Section 8(b) of the Federal Deposit Insurance Act ("FDIA"), *as amended* by FIRREA (to be codified at 12 U.S.C. § 1818(b)).

Upon review of the Notice, and of the entire record herein, the OTS has determined that the violations or

unsafe or unsound practices specified in the Notice, and the continuation thereof, are likely to cause insolvency or significant dissipation of the assets or earnings of Columbia, or are likely to weaken the condition of Columbia or otherwise prejudice the interests of Columbia or depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of Section B of the FDIA, *as amended* by FIRREA (to be codified at 12 U.S.C. § 1818(b)(1)).

THEREFORE, by the authority under Section 8(c) of the FDIA, *as amended* by FIRREA (to be codified at 12 U.S.C. § 1818(c)), Spiegel is ORDERED TO CEASE AND DESIST FROM:

1. Until such time that Spiegel has complied fully with this Order, directly or indirectly withdrawing or transferring or attempting to withdraw or transfer funds or other assets from any account at any financial institution or brokerage firm, including without limitation Columbia, in which Spiegel or his immediate family, has a legal or beneficial interest, except to comply with this Order.

IT IS FURTHER ORDERED THAT:

2. Effective immediately upon receipt of this Order, Spiegel shall not directly or indirectly vote or cause or permit to be voted shares of the common or preferred stock of Columbia ("Columbia stock") in which he has a legal or beneficial interest, nor shall Spiegel obtain a proxy to vote or otherwise directly or indirectly vote or cause to be voted any other shares of Columbia stock, until such time as the Director of OTS or his designee ("Director") permits such voting to occur.

3. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall cause to be deposited in an escrow account, established at a financial institution

approved by the Director, all of the common and preferred stock of Columbia in which Spiegel has a legal or beneficial interest. Spiegel's shares of Columbia stock shall remain in this escrow account until such time as the Director permits the stock to be released.

4. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall make restitution to Columbia or Columbia's successor in the amount of $5,747,000.

The sum represents the amount of unjust enrichment and includes interest calculated until July 1, 1990, at the prime rate of interest as stated in the Wall Street Journal plus 200 basis points ("interest"), resulting from the losses incurred by Columbia on approximately $28 million in loans that Spiegel caused Columbia to make to Howard Schneider, a personal friend of Spiegel, without adequate underwriting and at below market interest rates, and on Columbia's unsafe and unsound investments in stock options of Schneider's automobile dealerships. This sum also represents the unjust benefits to Spiegel for Spiegel's use of luxury automobiles provided by Schneider to Spiegel at a time when Columbia was negotiating, making or funding loans to Schneider. Spiegel's use of Schneider's automobiles constitute a violation of Savings Associations Regulations and constitutes an unsafe and unsound practice and a reckless disregard for the law.

5. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall make restitution to Columbia or Columbia's successor in the amount of $463,000.

This sum represents the amount of unjust enrichment to Spiegel resulting from benefits Spiegel received from Columbia for travel, guns and other miscellaneous ex-

penses that were paid by Columbia, including interest. These unauthorized expenses are unsafe and unsound practices and constitute a reckless disregard for the law.

6. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall make restitution to Columbia or Columbia's successor in the amount of $6,443,000 in cash.

This sum represents the amount of unjust enrichment, including interest, resulting from the benefits to Spiegel and the costs to Columbia in maintaining aircraft and a luxury airplane hangar for the personal benefit of Spiegel, which resulted in losses to Columbia in the amount of restitution the OTS herein is requiring from Spiegel. Spiegel's causing Columbia to incur these losses in the above described manner constitutes unsafe or unsound conduct and a reckless disregard for the law.

7. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall make restitution to Columbia or Columbia's successor in the amount of $1,094,000.

This sum represents the amount of unjust enrichment including interest to Spiegel resulting from his personal use of corporate assets, including Spiegel's exclusive use or control of the following condominiums owned by Columbia, without reimbursement to Columbia, for such use: Jackson Hole Unit #3126, located at 1800 Spirit Dance Road, Jackson Hole, Wyoming: Deer Valley Unit #24 located at 1065 Pinnacle Drive, Deer Valley, Park City, Utah: Vintage Club Condominium located at 75-137 Karenishway, the Vintage Club, Indian Wells, California; and Spiegel's control over the use of Jackson Hole Unit #3116, located at 1800 Spirit Dance Road, Spring Creek Ranch, Jackson, Wyoming ("Columbia condomini-

ums"). The personal exclusive use of or control over the use of corporate assets including Columbia condominiums, constitutes an unsafe and unsound practice and constitutes a reckless disregard for the law.

8. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall make restitution to Columbia or Columbia's successor in the amount of $2,870,000.

This sum represents the amount of unjust enrichment to Spiegel including interest resulting from excessive compensation based on a bonus in the amount of $2,400,000 that Spiegel received from Columbia in 1989 for the year ended 1988 and includes interest. This excessive compensation is a violation of the Rules and Regulations Applicable to all Savings Associations ("Savings Associations Regulations") and constitutes an unsafe and unsound practice and a reckless disregard for the law.

9. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall make restitution to Columbia or Columbia's successor in the amount of $2,366,000.

This sum represents the amount of unjust enrichment to Spiegel, including interest, resulting from the payments by Columbia to the Columbia Savings Charitable Foundation ("Charitable Foundation") without Spiegel obtaining Columbia's board of directors approval. Spiegel's causing Columbia to disburse funds without Columbia's board of directors approval constitutes unsafe and unsound conduct, and is a reckless disregard of the law.

10. No later than 12:00 noon, Pacific Standard Time, on Friday, July 6, 1990, Spiegel shall do or cause to be done all acts necessary to have designated or elected as a

director/trustee of the Charitable Foundation a number of persons to constitute a majority of the board acceptable to the Directors and to the board of directors and Chief Executive Officer of Columba.

11. Spiegel immediately shall comply with the decisions of the new Charitable Foundation board regarding the operations of the Charitable Foundation and the location and control of the assets, both cash and securities, as well as the books and records of the Charitable Foundation.

12. Until such time as the new Charitable Foundation board issues a decision regarding the operations and control of the Charitable Foundation and the assets of the Charitable Foundation, Spiegel shall not make any disbursements or participate in any decision to make any disbursements from the Charitable Foundation.

13. Spiegel shall comply with paragraphs 4, 5, 6, 7, 8, and 9 of this Order no later than 12:00 noon, Pacific Standard Time, on July 6, 1990, and may comply with such paragraphs by one or a combination of any of the following means: (a) by paying cash to Columbia; (b) by establishing and maintaining an escrow account on the amounts provided in paragraphs 4, 5, 6, 7, 8, and 9 at a financial institution approved by the Directors; or (c) by providing an irrevocable letter of credit or fidelity bond from a federally insured institution or an insurer approved by the Director and subject to terms and conditions as approved by the Director.

If Spiegel contends that compliance with this order would cause undue hardship to him or his dependents, Spiegel shall make appropriate application to the Director supported by (a) financial statements for himself and his affected dependents, prepared by and certified to by a

nationally recognized firm of accountants; (b) the United States and state tax returns for the years 1988 and 1989 for each such person; and (c) affidavits setting forth such other facts as thought to be pertinent.

14. To guarantee against any loss that might result from the prospective sale by Columbia of any of the three of the aforementioned Columbia condominiums which remain on the books of Columbia as an asset, no later than 12:00 noon, Pacific Standard Time, On Friday, July 6, 1990, Spiegel also shall deposit in the escrow account or otherwise provide security as described in paragraph 13 above $2,356,550, which is an amount equal to the cost of purchasing, furnishing and decorating the Columbia condominiums. If the Columbia condominiums cannot be sold for such values, the difference between the acquisition, furnishing and decorating values and the sale prices shall be paid as restitution to Columbia from this escrow account.

15. Spiegel immediately shall terminate all written and oral agreements with Columbia regarding Spiegel's receipt in any form of compensation from Columbia, including the consulting agreement entered into with Columbia on December 27, 1989.

16. Spiegel's remittance of these moneys, if made in cash, should be made payable to Columbia Savings and Loan Association and delivered to:

Chief Executive Officer
Columbia Savings and Loan Association
8840 Wilshire Boulevard
Beverly Hills, California 90211

17. Notice of the establishment of the escrow account referenced in paragraphs 3, 4, 5, 6, 7, 8 and 9 and the termination of the consulting agreement and all other related agreements referenced in this Order, as well as notice of Spiegel's compliance with this Order should be provided to:

Director
Office of Thrift Supervision
U.S. Department of the Treasury
1700 G Street, N.W.
Washington, D.C. 20552

In addition, one copy of Spiegel's notice of establishment of escrows, termination of the agreements and compliance with this Order, should be delivered to:

Director of Enforcement
Office of Thrift Supervision
U.S. Department of the Treasury
1700 G Street, N.W.
Washington, D.C. 20552

DEFINITIONS

All technical words or terms used in this Order, for which meanings are not specified or otherwise provided by the provisions of this Order, shall, insofar as applicable, have meaning as defined in the Code of Federal Regulations, Title 12, Chapter V; or as defined in FIREA; the FDIA; or the HOLA; and any such words or terms undefined in the foregoing shall have meanings that accord with the best custom and usage in the savings association industry.

EFFECTIVENESS

THIS ORDER shall be and is effective upon service on Thomas Spiegel, and shall remain effective and enforceable until the completion of the administrative proceeding initiated by the Notice, incorporated by reference herein, served upon Spiegel and until such time as the OTS shall dismiss the charges specified in such Notice, or if a Cease and Desist Order is issued against Spiegel, until the effective date of such Order.

Issued: July 5, 1990

TIMOTHY RYAN
Director
Office of Thrift Supervision